(a) The opinion in said cause has been reported at 173 N. E. 2d 308, and is set out herein as Appendix A. The orders denying the Petition for Rehearing and the Motion to Reconsider were entered without opinion.

(b) The jurisdiction of this Court is invoked on the following grounds:

(i) The judgment sought to be reviewed was originally dated and entered on March 29, 1961.

(ii) Petition for Rehearing and Brief in support thereof were filed on April 18, 1961. Rehearing was denied on May 24, 1961. Motion to Reconsider Court's Ruling denying Petition for Rehearing was filed on June 12, 1961; and said motion was denied on June 30, 1961. Because of a pending motion in aid of this petition for Writ of Certiorari, said opinion and judgment has not yet been certified to the court below.

(iii) The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257(3) and 28 U. S. C. A. § 2101(e), which are set out in Appendix B.

(c) The questions presented for review are:

1. Whether or not the Marion Circuit Court denied due process of law to the petitioner (a township assessor restrained of his liberty pursuant to criminal indictment charging conduct which, under applicable tax laws, is subject only to civil penalties) by refusing to conduct a trial upon the issues formed by his complaint for habeas corpus (which alleged facts showing the criminal court proceedings and process to be void), the returns to the writ of habeas corpus of the criminal court, judge and sheriff (which neither asserted the validity of the criminal court proceedings and process, nor denied the allegations that they were void), and the plaintiff's controverting reply thereto (which realleged the totally void character of the crim-

inal court proceedings and process); by refusing to construe and apply the statute involved; by disregarding the issue of void process; and by denying petitioner's discharge notwithstanding his bondsman's failure to make a return to the writ of habeas corpus.

2. Whether or not the Supreme Court of Indiana denied petitioner due process of law by affirming the judgment of the Marion Circuit Court without considering that court's errors of refusing to conduct a trial upon the issues formed by the pleadings, of refusing to construe and apply the statute involved, of disregarding the issue of void process, and of denying the petitioner's discharge notwithstanding his bondsman's failure to make a return to the writ of habeas corpus; and by its own failure to order a trial of the issues formed by the pleadings; and by its own failure to construe the statute involved; and by its own failure to order the petitioner's discharge on writ of habeas corpus, and by its own failure to consider and decide the constitutional questions presented on appeal of the denial of petitioner's rights to due process and equal protection of the laws and privilege of the writ of habeas corpus.

3. Whether or not the Marion Circuit Court denied petitioner equal protection of the laws by overruling his exceptions to the returns of the Criminal Court, Judge and Sheriff to the writ of habeas corpus (which exceptions alleged insufficiency of the returns, and failure to explain, justify, or controvert the void character of the criminal processes); by disregarding the issue of void process; by refusing to conduct a trial and hear evidence; by failing to construe and apply the statute involved; and by refusing to discharge him upon writ of habeas corpus.

4. Whether or not the Supreme Court of Indiana

denied petitioner equal protection of the laws by affirming the judgment of the Marion Circuit Court without considering that court's errors of overruling petitioner's exceptions to the returns of the Criminal Court, Judge and Sheriff, of refusing to conduct a trial and hear evidence, of failing to construe and apply the statute involved and of refusing to discharge him upon writ of habeas corpus; and by its own failure to construe said statute; and by its own failure to consider and decide the effect of the failure of petitioner's bondsman to make return to the writ of habeas corpus; and by its own failure to consider and decide the issues, assigned on appeal, of denial of petitioner's constitutional rights to due process and equal protection of the laws, and privileges of writ of habeas corpus.

5. Whether or not the failure of both the Marion Circuit Court and the Supreme Court of Indiana to order the petitioner's discharge as prayed constituted a suspension of his privilege of the writ of habeas corpus, when invasion or rebellion was not apparent, and the public safety did not require it.

6. Whether the judgment of the Marion Circuit Court and the affirming decision of the Supreme Court of Indiana, decides the substantial federal question of the right of a citizen of the United States not to be deprived of his liberty without due process of law, in such a manner as to preclude the petitioner from obtaining an inquiry into the void character of the Criminal Court processes under which he is restrained, by a proceeding in habeas corpus in a civil court of competent jurisdiction, and in a way which is not in accord with applicable decisions of this court.

7. Whether the judgment of the Marion Circuit Court and the affirming decision of the Supreme Court of Indiana, decides the substantial federal question of the right of a citizen of the United States not to be

denied the equal protection of the laws, in such a manner as to preclude the petitioner from obtaining an inquiry into the void character of the Criminal Court processes under which he is restrained, by a proceeding in habeas corpus in a civil court of competent jurisdiction, and in a way which is not in accord with applicable decisions of this court.

(d) The constitutional provisions and statutes which the case involves, in addition to the jurisdictional statutes previously cited, are the following:

(1) *Constitution of the United States.*

(a) Amendment 5: "No person shall * * * be deprived of life, liberty or property without due process of law."

(b) Amendment 14, Clause 1: "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(c) Article 1, Section 9, Clause 2: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

(2) Applicable sections of Burns Indiana Statutes, the pertinent provisions of which are set out in Appendix B, are as follows:

§ 3-1901	§ 3-1916	§ 64-1201
§ 3-1904	§ 3-1917	§ 64-1321
§ 3-1905	§ 64-1001	§ 64-1402
§ 3-1907	§ 64-1024	§ 64-2102
§ 3-1914	§ 64-1025	§ 64-2103
§ 3-1915	§ 64-1026	§ 64-2818
	§ 64-1102	

(c) Concise Statement of Material Facts.

Pursuant to statutory authority as provided by Burns Indiana Statutes § 3-1901, *et seq.*, Paul E. Tegarden, a former township assessor of Washington Township, in Marion County, Indiana, applied for a writ of habeas corpus by filing a verified amended complaint in the statutory form in the Marion Circuit Court at Indianapolis, Indiana, against the Criminal Court of Marion County, Division 2, Thomas J. Faulconer, in his capacity as Judge of Criminal Court of Marion County, Division 2, Robert A. O'Neal, in his capacity as Sheriff of Marion County, Phillip L. Bayt, in his capacity as Prosecuting Attorney for the 19th Judicial Circuit, Patrick J. Barton, in his capacity as Grand Jury Deputy Prosecuting Attorney for the 19th Judicial Circuit, and the United Bonding Insurance Company, wherein he alleged that he was a resident of Charlotte County in the State of Florida, and was being restrained of his liberty in Marion County in the State of Indiana, upon a certain pretended, false and void recognizance bond, under which he was being held to answer in the Criminal Court of Marion County, to a certain pretended, false and void indictment, purporting to charge him with a non-existent offense entitled "Refusal to Perform Duties." (Tr. pp. 12-19.) His amended complaint further alleged, as showing the illegality of his restraint, that the Criminal Court of Marion County did not have jurisdiction of the subject matter of the action, that the entire process against him in the Criminal Court of Marion County was void, including the Grand Jury indictment, filed against him in that court, the capias issued thereon, his arrest by the Sheriff, and his restraint pursuant to said arrest upon the recognizance bond posted by him and his bondsman, United Bonding Insurance Company; and that because all criminal processes against him were void the

Criminal Court of Marion County had no jurisdiction over him personally. The amended complaint for habeas corpus particularly alleged that the conduct with which he was charged in the void indictment was subject only to civil penalties within the exclusive jurisdiction of the Indiana State Board of Tax Commissioners, which the prosecuting attorney well knew, but that said prosecuting attorney, acting from malice and ill will, for political purposes, and in fear of certain newspapers, unlawfully influenced the grand jury to return an indictment by falsely representing to it that the acts alleged constituted a crime.

The Marion Circuit Court issued its writ of habeas corpus to all the defendants. (Tr. pp. 20-27.)

To the writ of habeas corpus, the defendants Criminal Court and its Judge, filed a return alleging the Grand Jury of Marion County, Indiana, returned to the Criminal Court of Marion County an indictment, copy of which was attached to the return, against the petitioner, Paul E. Tegarden, as defendant, who was thereafter arrested by the Sheriff of Marion County upon a capias ordered issued by the Criminal Court Judge, and who was thereafter recognized to appear before said court upon a recognizance bond signed by him, as principal, and by the United Bonding Insurance Co., as surety, which bond was accepted by the Sheriff, and said Tegarden released from his custody, and that said Criminal Cause No. Cr 21461Z entitled State of Indiana *vs.* Paul E. Tegarden was then pending in the Criminal Court. (Tr. pp. 32-46.)

To petitioner's amended complaint, the Sheriff of Marion County filed his return alleging that he did not have the petitioner in his custody, and that the acts performed by him as alleged in the petitioner's amended complaint were done pursuant to orders of the Criminal Court, which were regular upon their face. (Tr. pp. 32, 47-50.)

No return to the writ of habeas corpus was filed by the bondsman, United Bonding Insurance Company. No return to the writ of habeas corpus was filed by the defendants, Bayt, as Prosecuting Attorney, and Barton, as Deputy Prosecuting Attorney. On the return day of said writ, March 11, 1960, the petitioner dismissed his action against both Bayt and Barton. (Tr. p. 32, ll. 13-19, and p. 51.)

No trial was conducted on the return day, but the Circuit Court then fixed the time for hearing 10 days hence. (Tr. p. 32, ll. 11-12, and p. 119, ll. 7-17.) On the day scheduled for hearing, March 21, 1960, the petitioner filed exceptions (which under Indiana law perform the function of a demurrer) to the return of the Criminal Court and its Judge (Tr. p. 66, ll. 12-14, and pp. 83-88), and also to the return of the county sheriff (Tr. p. 66, ll. 14-16, and pp. 89-91) which exceptions in substance, alleged that the respective returns did not show sufficient cause for restraining petitioner, and did not constitute a sufficient answer to the petition for the reasons, among others, that the returns did not show the criminal process employed against petitioner was valid or legal, and that the acts alleged in the indictment were not a misdemeanor or crime under Section 331 of the tax law, but were acts subject only to the civil penalties provided in Section 134 of the same tax law.

The Circuit Court heard immediately the arguments of counsel on petitioner's exceptions, and summarily overruled the same (Tr. pp. 128-135), and would then have summarily denied the habeas corpus, but for the insistence by his counsel of petitioner's right to file a controverting reply to the returns filed by the court, judge and sheriff. (Tr. p. 135, l. 13 to p. 136, l. 17.) Such reply was thereupon immediately filed in open court (Tr. p. 66, ll. 11 and 12; pp. 92-95; p. 136, ll. 11-17), wherein petitioner denied the allegations of the returns, and also further specifically alleged that the purported indictment was void, that the

Criminal Court was without jurisdiction of the subject matter, that all process and orders of the capias for the arrest of petitioner was void, and that the arrest, and confinement, and delivery of the petitioner by the sheriff to the court were void, that the court acquired no jurisdiction over the person of the petitioner by reason of the void process, that all acts of the sheriff, including the arrest, approval and acceptance of recognizance bond, and continuing custody and restraint of petitioner thereunder, were void, and that the entire subject matter and process in the Criminal Court was void, as not being covered by Section 331 of the Tax Act, and that such subject matter was within the exclusive jurisdiction of the State Board of Tax Commissioners, as provided by Section 134 of the same Act. Upon the issues thus formed, the petitioner offered to submit evidence and adduce witnesses, but the Circuit Court refused to try the issues, overruled the offer to adduce witnesses, refused to allow the introduction of testimony or other evidence (Tr. pp. 137-143) and summarily entered the following judgment:

> "Parties present by counsel: defendants file returns which read as follows: (H. I.); to which petitioner Tegarden files his exceptions, which read as follows: (H. I.); and the Court, having heard the argument on the exceptions now overrules said exceptions. Thereupon the petitioner files his written reply to the returns which reads as follows: (H. I.); and the court, having indicated it will make its ruling upon the pleadings, counsel for the petitioner makes an offer to adduce witnesses and to introduce testimony in support of his contentions and the reply and his petition, which reads as follows: (H. I.); and the court being duly advised, overrules said motion and refused to grant permission to hear testimony, and makes a finding against the petitioner, that he should not be discharged as prayed, that the jurisdiction is in Criminal Court, Division 2, costs *vs.* the Petitioner. Dated March 21, 1960." (Tr. pp. 96, 97, and p. 143, l. 27 to p. 144, l. 22.)

On said hearing date there were present in the Marion Circuit Court Room, pursuant to subpoenas which had been issued by petitioner, more than 40 witnesses (Tr. pp. 138-143) in addition to the petitioner, available to testify in support of the allegations contained in the petitioner's complaint, and reply, including the members of the Grand Jury, which returned the indictment, witnesses who appeared before the Grand Jury, members of the State Board of Tax Commissioners, and owners of real estate described in the indictment, whose improvements were alleged not to have been assessed by petitioner as township assessor. The Circuit Court refused to permit the petitioner to have his witnesses sworn, to have the witnesses called to the witness stand to testify, to have the witnesses examined and cross-examined, and to have a trial of the issues in any form whatsoever. The judgment of the Circuit Court was entered summarily, arbitrarily, without the hearing of any testimony, without the examination of any documents or written evidence, without the study, construction or application of the provisions of the tax law which were involved, and without even so much as reading that law. (Tr. pp. 143-145.)

The judgment of the Circuit Court was appealed to the Supreme Court of Indiana (Tr. pp. 148-149 and Tr. cover sheet, p. 1) which in turn, affirmed the decision of the Circuit Court (Appendix A), and thereby likewise denied the petitioner a trial on his issues. On the appeal, errors assigned which present the federal questions relied upon were as follows:

> "1. The court erred in denying the Appellant the relief to which he is entitled.
>
> "7. The court erred in overruling the Appellant's exceptions to the return of the Appellees Criminal Court of Marion County, Division 2, and Thomas J. Faulconer, in his capacity as Judge thereof.

"8. The court erred in overruling the Appellant's exceptions to the return of the Appellee Robert A. O'Neal as Sheriff of Marion County, Indiana.

"9. The court erred in deciding that it would make its ruling upon the pleadings without the hearing of the testimony of witnesses.

"10. The court erred in overruling the Appellant's offer to adduce witnesses and introduce testimony in support of his complaint for Writ of Habeas Corpus, his exceptions and his reply to the returns theretofore filed by the Appellees, Criminal Court of Marion County, Division 2, Thomas J. Faulconer, its Judge, and Robert A. O'Neal, as Sheriff of Marion County.

"11. The court erred in refusing and denying to permit Appellant to introduce evidence in support of his contentions, his complaint for Writ of Habeas Corpus, his exceptions to the return of said Appellees, and his reply to the returns of the Appellees Criminal Court of Marion County, Division 2, Thomas J. Faulconer, its Judge, and Robert A. O'Neal, as Sheriff of Marion County.

"12. The court erred and abused its discretion in refusing to hear evidence and the testimony of witnesses on the issues in said cause.

"13. The court erred and abused its discretion in making a finding upon the pleadings without permitting the appellant to adduce witnesses and introduce evidence, and without hearing the testimony of witnesses upon the issues raised by said pleadings.

"14. The court erred and abused its discretion by denying the appellant his constitutional right to have remedy by due process of law as guaranteed by Amendment 14, Section 1 of the Constitution of the United States, Amendment 5 of the Constitution of the United States, and Article I, Section 12 of the Constitution of the State of Indiana.

"15. The court erred in making its finding against the appellant.

"16. The court erred in rendering its judgment that the appellant should not be discharged as prayed.

"17. The court erred in rendering its judgment that the jurisdiction of said Habeas Corpus proceeding was in the Criminal Court of Marion County, Division 2.

"18. The court erred in refusing to grant the appellant his liberty as prayed for in the Appellant's Amended Complaint for Habeas Corpus.

"19. The court erred in refusing to discharge the plaintiff from unlawful and illegal restraint, as prayed for in the Appellant's Second Amended Complaint for Habeas Corpus.

"20. The court erred and abused its discretion in denying the appellant his constitutional right of equal protection of the laws as guaranteed by Amendment 14, Section 1 of the Constitution of the United States and by Article 1, Section 23 of the Constitution of the State of Indiana." (Tr. pp. i-v.)

The opinion of the Supreme Court of Indiana, set out in full as Appendix A, first concerns itself with points not involved herein concerning the propriety of the prosecuting attorney's participation in the proceedings after the action had been dismissed against him. Beginning with its fourth grammatical paragraph, the opinion recites the facts, *though in many instances quite inaccurately,* upon which it based its subsequent conclusions. In the fifth paragraph the refusal of the Circuit Court to allow witnesses to be adduced and to hear testimony, and to try the issues, is recited as a statement of fact, but no judgment or decision is made by the Supreme Court concerning the rightness or wrongness of that action of the trial court, nor is any comment made by the Supreme Court concerning whether or not that conduct deprived the petitioner of due process of law or denied the petitioner the equal protection of the laws.

The opinion concludes with "some discussion concerning the construction of the statute" and makes its decision

"without here formally and finally construing the statute, but upon cursory examination thereof, * * *."

The opinion of the Supreme Court did not decide or rule upon any of the federal questions presented by the assignment of errors, which questions have been consolidated and restated in this Petition for Writ of Certiorari. These questions, if referred to at all, were dismissed lightly by the Supreme Court in a footnote to the final sentence of the opinion, which footnote reads as follows: "Other issues presented by the appellant have not been discussed since they are not material to our decision."

Within the time allowed by the rules of the Supreme Court of Indiana, on April 18, 1961, a petition for rehearing was filed (Tr. cover sheet, p. 2) which pointed out numerous errors in the court's opinion, including the failure of the court to rule upon the federal questions presented by the assignment of errors. The petition for rehearing is incorporated herein as Appendix C.

The petition for rehearing, without argument thereon, and without written opinion, was denied on May 24, 1961. (Tr. cover sheet, p. 2.)

Within the time allowed by the rules of the Supreme Court of Indiana, the petitioner filed on June 12, 1961, his motion to reconsider the court's ruling denying petition for rehearing (Tr. cover sheet, p. 2) in which the Supreme Court again was asked to rule upon the federal questions presented by the assignment of errors. The motion to reconsider is set forth herein as Appendix D.

The Supreme Court of Indiana, on June 30, 1961, denied petitioner's motion to reconsider the court's ruling, denying petition for rehearing without oral argument and without opinion. (Tr. cover sheet, p. 2.) Within the time allowed by the rules of the Supreme Court of Indiana, on July 20, 1961, the petitioner filed a motion in aid of this Petition for Writ of Certiorari. (Tr. cover sheet, p. 2.)

ARGUMENT AMPLIFYING REASONS FOR THE ALLOWANCE OF THE WRIT.

Upon the foregoing statement of facts, we come to the questions of whether or not the petitioner has been deprived of his constitutional rights of due process, equal protection of the laws, and privilege of the writ of habeas corpus.

The constitutional provisions appear in Appendix B and no necessity appears for repeating them here. The record discloses that the Marion Circuit Court gave no consideration to the petitioner's allegation that the entire process was void, made no construction or application of the provisions of the tax law referred to in the pleadings, and denied the petitioner the opportunity of presenting any evidence in support of the allegations of the complaint for habeas corpus. The Circuit Court's decision was based upon its conclusion that the Criminal Court of Marion County had jurisdiction of the proceeding in habeas corpus. (Tr. pp. 132, l. 19 to 134, l. 8.)

The opinion of the Supreme Court of Indiana discloses that it did not "formally and finally" construe the statute "but upon cursory examination thereof" found "there is a serious question of statutory construction presented" which should be determined by the Criminal Court of Marion County. The opinion concludes that the issue cannot be presented by proceedings in habeas corpus in the Circuit Court. The Supreme Court did not consider, discuss, or decide any of the constitutional questions presented by the petitioner's assignment of errors.

Under such circumstances the petitioner has not received the hearing upon the issues presented by the pleadings, which the due process clauses of the Federal constitution guarantee him.

Two recent cases of the United States Supreme Court have held that where the petition for habeas corpus alleges serious charges, even though denied by the State, the petitioner is entitled to a hearing thereon, and denial thereof violates due process; and when the state court summarily dismisses the habeas corpus petition, certiorari will be granted by the United States Supreme Court, and said cause will be remanded with instructions to proceed with trial.

Commonwealth of Pennsylvania, ex rel. Herman v. *Claudy* (1956), 350 U. S. 116, 76 S. Ct. 223.

Calvin Sublett v. *Adams, Warden* (1960), 362 U. S. 143, 80 S. Ct 527.

The conclusion of the Indiana Supreme Court that where an action is challenged on the basis of the construction of the statute that orderly judicial process requires that the issue of judicial construction and application of the statute to the existing facts must be presented directly in the court of original jurisdiction by an appropriate pleading in that court, is totally out of harmony with numerous decisions of this court, and better reasoned decisions of other state Supreme Courts. An example of this is found in the case of *People* v. *Schildhaus* (1960), 8 N. Y. 2nd 333, 167 N. E. 2d 640, which sustained the right of the New York Supreme Court in a proceeding for habeas corpus, to determine that the judgment of a magistrate's court was void for want of jurisdiction. The Court of Appeals of New York held:

> "Although the challenge to the jurisdiction of the Magistrate's Court could have been raised by the defendant on appeal from the judgment of conviction * * * and although that might have been a more orderly and regular method of procedure, the right to invoke habeas corpus, 'the historic writ of liberty', 'the greatest of all writs', is so primary and funda-

> mental that it must take precedence over considerations of procedural orderliness and conformity. See U. S. Constitution, Article 1, Section 9; * * *."

In the case of *Bowen* v. *Johnston, Warden* (1939), 306 U. S. 19, 59 S. Ct. 442, this court, while observing that in removal proceedings where the locus of the alleged crime depended on consideration of many facts and controverted questions of law, such matters must be determined by the court where the indictment was found and not by demanding a ruling thereon in a habeas corpus proceeding, nonetheless held:

> "But the rule, often broadly stated, is not to be taken to mean that the mere fact that the court which tried the petitioner had assumed jurisdiction, necessarily deprives another court of authority to grant a writ of habeas corpus * * * Despite the action of the trial court, the absence of jurisdiction may appear on the face of the record * * * and the remedy of habeas corpus may be needed to release the prisoner from a punishment imposed by a court manifestly without jurisdiction to pass judgment.
>
> "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."

In an annotation appearing in 57 A. L. R. page 85, the author points to the general rule that the scope of a writ of habeas corpus extends to questions affecting the jurisdiction of the court, the sufficiency in point of law of the proceedings, and the validity of the judgment or commitment under which the prisoner is restrained. The annotation points out:

> "It is clear that, where a person is detained for the doing of certain acts which neither at common law nor under the law of the particular state constitute any offense, the court has no jurisdiction, since jurisdiction in this class of cases depends upon a violation of

> some law, and therefore habeas corpus will issue where this state of facts is alleged by the applicant, or where it is admitted in the return. *Ex parte Siebold* (1880), 100 U. S. 371, 25 L. Ed. 717; *Ex parte Yarbrough* (1884), 110 U. S. 651, 4 S. Ct. 152; *Re Coy* (1888), 127 U. S. 731, 8 S. Ct. 1263; *Andrews* v. *Swartz* (1895), 156 U. S. 272, 15 S. Ct. 389; *U. S.* v. *Pridgeon* (1894), 153 U. S. 48, 14 S. Ct. 746; *Greene* v. *Henkel* (1902), 183 U. S. 249, 22 S. Ct. 218; *Hyde* v. *Shine* (1905), 199 U. S. 62, 25 S. Ct. 760; * * *"

The case of Yarbrough originated in the United States Supreme Court by his application for writ of habeas corpus, upon allegations that the trial, conviction, and sentence of the circuit court of the United States, under which he was held, were illegal, null and void. This court then held that it is:

> "* * * well settled that when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is its duty, to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such court had no jurisdiction, to discharge the prisoner from confinement."

The case of *Re Coy* arose upon his application for writ of habeas corpus in the Circuit Court of the United States for the District of Indiana, wherein it was alleged that the action of the Grand Jury returning the indictment, and of the District Court and the Marshal thereof, in taking him into custody and restraining him of his liberty under and by virtue of the judgment, order and commitment of said court, were wholly void and the imprisonment unlawful. Upon refusal to issue the writ, appeal was taken to the United States Supreme Court upon the single question of whether the District Court which tried the indictment had jurisdiction. This proposition was founded, not upon any

want of jurisdiction of the person, but upon the broad statement that the indictment presented no crime or offense under the laws of the United States. After extensive review of the facts and the law, this court concluded against the contention of Coy and denied the habeas corpus, but in doing so, recognized the principle of the use of habeas corpus to test whether or not the process of the district court was void. Judge Field states the principle as follows:

> "* * * the sole question that court (Circuit Court) could consider was whether the district court of Indiana, in which the appellants were indicted, tried and convicted, had jurisdiction of the offense and of the parties accused, and to render the judgment pronounced. As was said in *Ex parte Siebold*, 100 U. S. 375: 'The only ground on which this court, or any court, without some special statute authorizing it, will give release on habeas corpus to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.' *But that this court and the Circuit Court can exercise jurisdiction by habeas corpus in cases where it is alleged that by the action of an inferior tribunal a citizen of the United States has been unlawfully deprived of his personal liberty, is well established;* and they can look into the record of the inferior court, under whose judgment the parties are restrained of their liberty, to ascertain whether it had jurisdiction to hold and try them, and render the judgment * * * But if it had no jurisdiction over the parties or of the offense with which they are charged, or to render the judgment, the Circuit Court and this Court can interfere and discharge them." (Emphasis ours.)

In the case of *U. S.* v. *Pridgeon* this court stated:

> "Under a writ of habeas corpus, the inquiry is addressed, not to errors, but to the question whether the proceedings, and the judgment rendered therein, are, for any reason, nullities; * * *"

Mr. Justice Harlan recognized the principle in *Andrews* v. *Swartz*, when he said that it is a

> "* * * well-established rule that a prisoner under conviction and sentence of another court will not be discharged on habeas corpus *unless the court that passed the sentence was so far without jurisdiction that its proceedings must be regarded as void.*" (Emphasis ours.)

The decisions of the Marion Circuit Court and of the Indiana Supreme Court in the instant case also appear to be out of harmony with previous decisions of the Indiana Supreme Court. In *State ex rel. Eggers* v. *Branaman* (1932), 204 Ind. 238, 247, the Indiana Supreme Court said:

> "A defendant, however, is under no duty to take advantage of any particular legal remedy which may happen to be available at the risk of being precluded from attacking in a habeas corpus proceeding an alleged void judgment. The remedy of habeas corpus is more fundamental, and far-reaching as against void judgment, than the remedy of appeal. The right to a writ of habeas corpus is a part of the law of the land, and if the facts justify relief thereunder a party is entitled to this relief even though the same result might have been achieved by the more common remedy of appeal. This court is as much bound to exercise its power of issuing writs of mandamus to remove an obstacle which stands in the way of an applicant's use of the remedy of a writ of habeas corpus as it is to exercise this same power to remove an obstacle which stands in the way of an applicant's use of a motion for a new trial in order to perfect an appeal."

In the case of *Gingerich* v. *State* (1948), 226 Ind. 678, 689, Judge Gilkison said that:

> "An * * * indictment charging a defendant with a crime not defined by any statute by the State of Indiana is a nullity * * * Section 9-2401, Burns 1942 Repl.; *State* v. *Gosselin* (1939), 110 Vt. 361, 365, 366; *State*

v. *Ryea* (1923), 97 Vt. 219, 221; *Kellerman* v. *United States* (1924), 295 Fed. 796, 798; *United States* v. *Leach* (1923), 291 Fed. 788, 792; *People* v. *Patrick* (1941), 26 N. Y. S. 2nd 183, 186 * * *; *State* v. *Ulrich* (1902), 96 Mo. App. 689; 31 C. J. Indictments and Informations, § 536, pp. 874, 875; *State* v. *Levy* (1893), 119 Mo. 434; 42 C. J. S. Indictments and Information, Sec. 319, p. 1348. See also *Romary* v. *State* (1945), 223 Ind. 667, 670, 64 N. E. 2d 22; *Laycock* v. *State* (1893), 136 Ind. 217, 225, 36 N. E. 137."

In the case of *Witte* v. *Dowd, Warden* (1951), 230 Ind. 485, the Indiana Supreme Court recognized that habeas corpus is a constitutional right which cannot be impaired by statute, and in construing Clause 2 of Section 3-1918 Burns 1946 Replacement, which prohibits an inquiry into the legality of any judgment or process issued on any final judgment of a court of competent jurisdiction, held that said statute

> "* * * does not and cannot constitutionally prohibit an inquiry into the jurisdiction of the court rendering the sentence as determined by the intrinsic record of that court, and the process issued pursuant thereto."

The court in that case also cited and quoted with approval from the case of *Kabanya* v. *Fogarty* (1923), 193 Ind. 297, 301, as follows:

> "A writ of habeas corpus raises the question of the jurisdiction of the court over the persons and over the subject matter, and also his jurisdiction to enter the particular judgment which he does enter."

Continuing, the Indiana Court also quotes with approval from the opinion of Mr. Justice Field in *Re Bonner* (1884), 151 U. S. 242, 256, 257, 14 S. Ct. 323, as follows:

> "From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be

determined. It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void."

Chief Justice Gilkison's opinion in the *Witte* case is so persuasive that it merits extensive quotation as follows:

"I think the so-called regulation made by clause 'second' § 3-1918, Burns' 1946 Replacement is unreasonable and unconstitutional. It is as follows:

> 'No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following:
>
> * * * * *
>
> 'Second. Upon any process issued on any final judgment of a court of competent jurisdiction.
>
> * * * * *

"Clause second thereof is in direct contravention of Art. 1 § 27 of the constitution of Indiana, providing as follows:

> 'The privilege of the writ of habeas corpus shall not be suspended, except in case of rebellion or invasion; and then, only if the public safety demand it.'

"The statute noted is clearly an attempt by the Legislature to limit and to suspend permanently the privilege of the writ of habeas corpus in many proper cases in open conflict with the constitutional provision noted. In such a situation the statute must yield to the superior command of the constitution. * * *

"Since the constitutional provision on habeas cor-

pus transcends the statute noted, the state must provide a forum in which appellant and others who may be similarly situated can file their habeas corpus proceedings and pursue the same to final judgment. That is the meaning of the constitutional provision for habeas corpus. It is also commanded by Article 1, § 12 of the Indiana Constitution as follows:

> 'All courts shall be open; and every man, for injury done to him in his person * * * shall have remedy by due course of law. Justice shall be administered * * * completely, and without denial; * * *'

"* * * I think it may properly be said that this section is not satisfied unless an opportunity is given a party to have his habeas corpus action tried completely and without denial in a court of competent jurisdiction as guaranteed by this section of the State Constitution. The statute, § 3-1918, Burns' 1946 Replacement, boldly denies appellant a forum in which to have a trial for the alleged 'injury done to him in his person.' *Greencastle Township, et al.* v. *Black* (1854), 5 Ind. 557, 564. See authorities in *State, ex rel. Cline, et al.* v. *Schricker, Governor, et al.* (1949), 228 Ind. 41, 70, 89 N. E. 2d 547; *Ellingham* v. *Dye* (1912), 178 Ind. 336, 342, 99 N. E. 1; *Ex parte Milligan* (1866), 4 Wall. 2, 18 L. Ed. 281, 295.

"Prior to the enactment of this statute this court consistently adhered to the rule:

> '"that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create a necessity for an appeal."
>
> 'This question of jurisdiction the judge had a right to inquire into on the hearing upon habeas corpus, both upon general principles of law, and under our statute.' *Miller* v. *Snyder* (1854), 6 Ind. 1, 3.

"This rule was followed by this court even as against courts of general jurisdiction long after the

enactment of the questioned statute. In *Smith* v. *Clausmeier* (1893), 136 Ind. 105, 109, 35 N. E. 904, this court said:

> 'Even in case of a court of superior and general jurisdiction, and where the record shows a judgment, and sentence entered up against a defendant, a writ of *habeas corpus* will be awarded and the defendant discharged, *on a plea to the return*, with proof, showing that no such judgment was entered upon the order book until after adjournment of court. *Passwater* v. *Edwards* (1873), 44 Ind. 343, 345.' (My italics.)

* * *

"But in the latter case (*Stephenson* v. *Daly, Warden* (1927), 200 Ind. 196, 200, 158 N. E. 289), I think the correct statement of the law of habeas corpus is found in the concurring opinion of Martin, J., at page 203, thus:

> "* * * but, where it is alleged that there are radical jurisdictional defects, sufficient to render the judgment void and subject to collateral attack, and that such lack of jurisdiction can be determined from the record (the record proper is the petition and the return), *habeas corpus* is the proper remedy. Want of jurisdiction over the person or subject matter is always ground for such relief. If the court has acted without such jurisdiction, the judgment is absolutely void, and one who is imprisoned under and by virtue of such a void judgment may be discharged from custody on *habeas corpus*. 29 C. J. 30, note 16; 12 R. C. L. 1196; *Miller* v. *Snider* (1854), 6 Ind. 1; *People* v. *Simon* (1918), 284 Ill. 28, 119 N. E. 940. As to person, see *In re Mayfield* (1890), 141 U. S. 107, 35 L. Ed. 635; *In re Reese* (1901), 107 Fed. 942; *Ex parte Reed* (1879), 100 U. S. 13, 25 L. Ed. 538; *Eureka Bank* cases (1912), 35 Nev. 80, 126 Pac. 655. As to subject-matter, see *Hans Nielson, Petitioner* (1889), 131 U. S. 176, 33 L. Ed. 118; *Ex parte Lange* (1874), 18 Wall. 163; *Ex*

parte Yarbrough (1884), 110 U. S. 651, 28 L. Ed. 274; *Ex parte Justus* (1909), 3 Okla. Crim. 111, 104 Pac. 933, 25 L. R. A. (N. S.) 483.

'Statutes such as § 1200 Burns, 1926, providing substantially that courts shall not, in *habeas corpus* actions, inquire into the legality of any final judgment "of a court of competent jurisdiction" have uniformly been held not to preclude inquiry into the question as to whether the court had jurisdiction. 29 C. J. 55, note 55.

'A court of "competent jurisdiction" is not merely a court that is "capable" of acquiring jurisdiction, but it is a court which has jurisdiction of the person and of the subject matter. *Babbitt* v. *Doe* (1853), 4 Ind. 355; *In re Norton* (1902), 64 Kans. 842, 849; *People, ex rel.* v. *Liscomb* (1875), 3 Hun. (N. Y.) 760, 60 N. Y. 559.

'It does not here appear that the Hamilton Circuit Court considered or determined the question which is now raised as to its jurisdiction, but it does not matter whether or not that court decided that it had authority to try and determine the case, because, if no such power existed in the court, its decision would not give it the power. Its judgment may be questioned anywhere for want of jurisdiction. Bailey, Habeas Corpus 80'."

The final paragraph of the Indiana Supreme Court's opinion in the instant case reads as follows:

"We conclude that orderly judicial process requires that, as in this case, a person is restrained of his liberty pursuant to a criminal action, which action is phrased in the language of an existing statute and where an action is challenged on the basis of the construction of the statute, then the issue of judicial construction and application of the statute to the existing facts must be presented directly in the court of original jurisdiction by an appropriate pleading in that court. The issue cannot be presented indirectly by proceedings in habeas corpus in another court." (Appendix A.)

The record in the instant case, however, does not support the assumptions upon which the Supreme Court of Indiana makes its conclusions. The record shows that the petitioner is restrained of his liberty on process issued on a void indictment, hence there is *no* "criminal action". The record discloses that the indictment is *not* "phrased in the language of an existing statute". The record shows that the Criminal Court is *not* the "court of original jurisdiction", because it had *no jurisdiction* in the first instance, or at any time.

The record shows that the petitioner claimed his release in a habeas corpus proceedings upon allegations that the entire process against him was void.

Decisions of the United States Supreme Court and of the Supreme Court of the State of Indiana have consistently held that habeas corpus is the proper remedy by which the issue of void process may be properly presented.

Indiana Statutes provide for the bringing of proceedings in habeas corpus in the Circuit and Superior Courts of the State.

Burns 3-1901, *et seq.*

In denying the petitioner the right to pursue his remedy in habeas corpus in the Circuit Court, the Supreme Court of Indiana has denied petitioner that protection of the habeas corpus laws, which the statute says belongs to all citizens. Such denial is a denial of the equal protection of the laws guaranteed to petitioner by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The refusal of the Marion Circuit Court and the decision of the Indiana Supreme Court both have denied the petitioner a hearing and trial upon the issues raised by the pleadings in the trial court. Both have refused to grant

the petitioner freedom from the illegal restraint imposed upon him by the void process alleged. By such decisions both the Marion Circuit Court and the Indiana Supreme Court have deprived the petitioner of his liberty without due process of law, in violation of the Fifth Amendment and Clause 1 of the Fourteeth Amendment to the Constitution of the United States.

Saunders v. *Shaw* (1917), 244 U. S. 317, 37 S. Ct. 638.

State ex rel. v. *Occidental Life Ins. Co.* (1938), 95 Fed. (2) 935, Cert. Den. 305 U. S. 603, 59 S. Ct. 63.

By the process of denying the petitioner equal protection of the laws, and depriving petitioner of his liberty without due process of law, the decisions of the Indiana courts have effectively suspended petitioner's privilege of the writ of habeas corpus in violation of Article 1, Section 9 (2) of the Constitution of the United States.

The case of *Ex parte Amos* (1927), 112 So. 289, decided by the Supreme Court of Florida, is strikingly similar to the instant case. Amos was indicted for malpractice in office under a catch-all clause of a statute denouncing the crime of wilfully charging, receiving, or collecting greater fees by any officer of the State than he is entitled to charge, receive or collect by law, or "malpractice in office not otherwise especially provided for". The conduct which the indictment contended was malpractice in office was failure on the part of Amos, as comptroller of the State of Florida, to perform his duty of taking possession of the property and business of a certain bank until its affairs were placed in safe and sound condition. After indictment Amos was arrested under a warrant issued by the court on that indictment. He applied for and obtained from the Supreme Court of Florida a writ of habeas corpus, alleging

that he was arrested and restrained of his liberty by virtue of a capias issued out of the Circuit Court for Palm Beach County, upon an indictment against him returned by the Grand Jury of that County, and that his imprisonment was illegal because the indictment charged no criminal offense against the laws of the State of Florida. The Supreme Court of Florida sustained Amos' application, and discharged him from custody, saying, among other things, that the writ of habeas corpus is a writ of right, and that where a person is held under color of criminal process, he is entitled to his discharge on writ of habeas corpus, if the act with which he stands charged is not in law a crime.

In the instant case the petitioner is charged under a catch-all section of the Indiana Tax Law (Burns 64-2818; Acts 1919, Ch. 59, Sec. 331) with the pretended offense of "Refusal to Perform Duties". This section of the statute, however, imposes as a condition precedent, the proviso "when no other provision is made herein" before the wilful neglect or refusal to perform duties imposed on him by the act would constitute a misdemeanor.

"Other provisions" were made in the act, applicable to this petitioner, which provided for removal from office of a township assessor, who did not discharge any of his duties faithfully, or in full accordance or compliance with law. (Burns 64-1001; Acts 1919, Ch. 59, Sec. 134.) Like the penalty of impeachment referred to in the *Amos* case, removal from office, or "impeachment", by the State Board of Tax Commissioners, was the penalty applicable against township assessors for the conduct alleged in the instant case.

The specific misconduct alleged in the indictment against petitioner was his failure, as township assessor, to assess omitted property and return the same to the county auditor. "Other provisions" were made by the same tax law concerning the assessment of omitted property. Among

sections of the Indiana statute concerning assessment of omitted property are Burns 64-1025, and 64-1026, both of which refer not only to the township assessor but also include the county assessor, the county auditor, the Auditor of State, the Board of Review and the State Board of Tax Commissioners. In addition Burns 64-1102 makes it the duty of the *county* assessor (not the *township* assessor) to assess omitted property. Duties of the county auditor, concerning assessing omitted property appear in Burns 64-1402. Duties of the county board of review concerning assessing omitted property appear in Burns 64-1201. Duties of the county treasurer concerning assessing omitted property appear in Burns 64-2102.

An examination of the entire tax act (Acts of 1919, Chapter 59) was necessary to a proper determination of the issue raised by petitioner's application for habeas corpus. Such examination, as well as an examination of the cases pertaining thereto[1] would have disclosed that the Legislature of the State of Indiana did not fix as a crime the conduct alleged against the petitioner in the indictment. The Legislature of the State of Indiana did fix a penalty for that conduct, but that penalty was impeachment or removal from office by the State Board of Tax Commissioners.

Amos received his remedy in the State of Florida. Tegarden, a resident of Florida, has been denied his remedy in the State of Indiana. The denial of the remedy to Tegarden is the result of the refusal of the Indiana Courts, both Circuit and Supreme, to give him the trial in the habeas corpus proceeding to which he is entitled under the due process clauses of the Federal Constitution,

1. *State ex rel.* v. *Goldthait* (1908), 172 Ind. 210, states unequivocally:

> "• • • But what we do hold is that the examination for and assessing of omitted property is committed to and is the duty of the *county* assessor." (Emphasis ours.)

the refusal to afford him the equal protection of the laws, and the suspension of his privilege of the writ of habeas corpus.

See particularly *Witte* v. *Dowd*, 230 Ind. 285, at page 499 and following.

Petitioner prays that a Writ of Certiorari issue to review the decision of the Indiana Supreme Court affirming the judgment of the Marion Circuit Court; that upon hearing of such writ the judgments of the Indiana Courts be reversed, and either that said petitioner be discharged upon habeas corpus, or said cause be remanded with instruction to proceed with trial, as this court may deem proper.

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APPENDIX A.

INDIANA SUPREME COURT OPINION.

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Attorney for Appellees:
John W. Tranberg, Indianapolis, Indiana.

IN THE SUPREME COURT OF INDIANA.

Paul E. Tegarden, *Appellant*,
vs.
Criminal Court of Marion County, Division 2;
Thomas J. Faulconer, in his capacity as Judge of Criminal Court of Marion County, Division 2:
Robert A. O'Neal, in his capacity as Sheriff of Marion County,
The United Bonding Insurance Company, a Corporation,
Appellees.
} No. 29940.

APPEAL FROM THE MARION CIRCUIT COURT.
John L. Niblack, Judge.

ACHOR, *Judge*

This is an appeal from a judgment in the Marion Circuit Court, wherein the court made an adverse finding against appellant on his petition for writ of habeas corpus.

The action was originally filed against the above named appellees and also against Phillip L. Bayt, as prosecuting attorney of Marion County, and Patrick J. Barton, as grand jury deputy prosecuting attorney, all of whom filed returns to the action. The action was later dismissed by the appellant as to Bayt and Barton, who subsequently thereto filed motions to dismiss the action and thereby attempted to re-enter into the case. The appellant then filed a motion to strike the motions of prosecutor Bayt and deputy prosecutor Barton, but no action was taken by the court with respect to either of said motions.

The briefs contain considerable argument as to the status of Bayt and Barton in the proceedings and the effect on the judgment resulting from the fact that the court failed to rule upon appellant's motion to strike their motions to dismiss. However, since the action was not dismissed, but was decided upon the "returns" of the appellees, we cannot say that failure of the court to rule on the appellant's motion to strike in any way prejudiced the rights of the appellant and therefore constitutes reversible error.

The returns of the appellees are, in substance, that the appellant, under the authority of Acts 1919, Ch. 59, § 331, p. 198 (being § 64-2818, Burns' 1951 Repl.) was indicted by the grand jury for having wilfully neglected and refused to perform the duties imposed upon him by law while township assessor of Washington township, Marion County, Indiana; that a capias was issued pursuant to the indictment by reason of which appellant was placed under arrest by the appellee Sheriff of Marion County, and that appellant was returned to and before the appellee Criminal Court of Marion County, Division 2, which court released appellant upon a recognizance bond issued by appellee United Bonding Insurance Company. The pleadings and papers above referred to were incorporated as exhibits in the return. To this return, appellant filed exceptions in

which appellant asserted that the return was inadequate for the reason that it failed to meet and overcome appellant's allegations that the entire proceedings in the Criminal Court were *void*, and that for this reason there was a total lack of jurisdiction in the Criminal Court over the subject-matter of the action and the person of the defendant (appellant). Specifically, appellant asserts such lack of jurisdiction in the Criminal Court on the ground that under the statute "there is no such criminal offense."

After argument the court overruled appellant's exceptions. Appellant then filed a reply to the returns of the above named appellees and asked to submit evidence and adduce witnesses on the issues. The court refused to adduce witnesses and hear testimony and to try the issues, and made a finding, based solely upon the petition of the appellant and the returns filed thereto, that appellant should not be discharged as prayed and that jurisdiction is in the Criminal Court of Marion County, Division 2.

The law is well settled that, as a general rule, a court in which an indictment or affidavit is pending has exclusive jurisdiction over the proceedings and that the right of such court to restrain the accused of his liberty by reason of such action cannot be challenged by habeas corpus in another court once it appears that the petitioner is being held on a warrant to answer such charge. *State ex rel. Smith* v. *Marion C. Ct.* (1951), 230 Ind. 21, 101 N. E. 2d 272; *Bryarly* v. *Howard, Warden* (1947), 225 Ind. 183, 73 N. E. 2d 839; *Wright* v. *The State* (1854), 5 Ind. 290. However, appellant asserts that the above stated general rule is not applicable to the proceedings in the Criminal Court for the reason that such proceedings were *totally without statutory authority* and therefore a complete nullity, and that under these special circumstances the Circuit Court or any court of concurrent jurisdiction had authority in

habeas corpus to consider the matter of petitioner's unlawful restraint.

Here the charge filed in the Criminal Court stated *in the language of the statute* that appellant (petitioner) wilfully neglected and refused to perform the duties of his office. The section of the act under which the charge was filed is, in part, as follows:

> "Any officer who shall be guilty of violating any provisions of this act, or who shall wilfully neglect or refuse to perform any of the duties imposed on him by this act, when no other provision is made herein, shall be guilty of a misdemeanor, * * *" § 64-2818, *supra.*

Thus the decision of the case involves not merely a question of fact, but, preliminary thereto, there is a question of statutory construction which must be decided. Appellant asserts that he is expressly excluded from criminal prosecution for the misconduct charged by the express provision of the act, which limits its application to circumstances "when no other provision is made." He further cites the fact that Section 134 (which is a section of the same act) specifically makes "other provisions" with respect to an assessor by providing for his *removal from office* in event of his "incompetency, neglect of duty or misconduct in office." The last cited section of the act reads in part as follows:

> "* * * In the event that the state board of tax commissioners finds that any township assessor or any deputy township assessor has not discharged any of his duties faithfully or in full accordance or compliance with law, such township assessor or deputy township assessor may be removed from office by the state board of tax commissioners for incompetency, neglect of duty or misconduct in office, * * *" § 64-1001, Burns' 1951 Repl.

Thus appellant asserts that because "other provision is made" in § 64-1001, *supra,* for disciplinary action against township assessors, he is therefore expressly excluded from the penal provisions of § 64-2818, *supra.* Appellant asserts that under the statute the only recourse available for his alleged misconduct in office is limited to his removal from office by the state board of tax commissioners under § 64-1001. For this reason appellant asserts that the prosecution in the Criminal Court is wholly *void* and he may resort to proceedings in habeas corpus for discharge from his alleged unlawful restraint in any court having jurisdiction over the restraining officers.

However, the prosecution in the Criminal Court is not a clear and complete nullity, as appellant asserts. The pertinent statute does not exclude appellant from its application in clear and unequivocal terms. Rather, it at least presents a serious question of statutory construction which it was the right and responsibility of the trial court to determine.

Because of the vigorous argument presented by appellant, some discussion regarding the construction of the statute seems appropriate. Without here formally and finally construing the statute, but upon cursory examination thereof, we note that the act, of which the above cited sections are a part, was enacted in 1919. It was a general re-enactment of the law relative to the taxation of property. The act consisted of 339 sections (§§ 1 to 339). Section 134 dealt generally with the selection, duties, bond, oath of office of assessors, and, further, provides for the removal of a township assessor by the state board of tax commissioners for "incompetency, neglect of duty or misconduct in office," and for appointment by the board to fill such vacancy. The obvious legislative purpose of this section was to ascertain, for the general public welfare, that the office of township assessor be filled and that the

duties of the office be performed in a diligent and competent manner; and to assure the accomplishment of this purpose, it provided for removal of an assessor on the grounds of mere *incompetence* or *neglect* of duty. In construing the act, it is to be noted, *first*, that it was not made material to such removal under § 134, *supra*, that the assessor should "wilfully neglect or *refuse* to perform the duties imposed upon him by this act" (our italics), which perverse and wilful misconduct is made the basis of a criminal prosecution under § 331 of the act (§ 64-2818), *supra*. *Secondly*, in construing the act consideration is to be given to the fact that § 331 is the last of three sections of the act which provide for *criminal punishment* of individuals who violate the act with perverse or wilful intent to thwart the purposes of the act.[1] Therefore, there is a serious question of statutory construction presented as to whether this term "when no other provision is made herein" is intended to apply only to the criminal provisions of the act, which immediately precedes said section, or whether the limitation is intended to apply also to proceedings for the mere *removal* of the assessor from office.

Suffice it to say that the Criminal Court of Marion County, Division 2, is here presented with a question of statutory construction which should not be determined by a collateral proceeding in a court not having primary jurisdiction over the very question presented.

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1. "Any person who, under any of the proceedings required or permitted by this act, shall wilfully swear falsely, shall be guilty of perjury and subject to all its penalties." Acts 1919, ch. 59, § 329, p. 198. (§ 64-2815, Burns' 1951 Repl.)

"Any assessor or member of a board of review, or of a board of tax commissioners, who shall wilfully assess any property at more or less than what he believes to be its true cash value, as the same is defined in this act, shall be guilty of a misdemeanor, and, on conviction thereof, he shall be punished by a fine not exceeding three hundred dollars ($300), or by imprisonment in the county jail not more than one (1) year, or both, in the discretion of the court." Acts 1919, ch. 59, § 330, p. 198 (§ 64-2816, Burns' 1951 Repl.)

Reasons for the rule above enunciated were considered by this court in the case of *State ex rel. Smith* v. *Marion C. Ct., supra*, 230 Ind. 21, 24, 25, 101 N. E. 2d 272. In that case Porter F. Jordan was indicted for murder in the second degree and the cause was assigned to the Criminal Court of Marion County, Division 2. A capias was issued to the sheriff, ordering him to hold the defendant without bail. Thereafter the defendant filed a petition for writ of habeas corpus for an order to be let to bail in the Marion Circuit Court, which made an order admitting the defendant to bail and fixed the amount of bond required. In the above case the issue of conflicting jurisdiction was presented to this court in an original action. In that case this court reasoned as follows:

> "• • • The Criminal Court has exclusive original jurisdiction of all crimes and misdemeanors, except where jurisdiction is by law conferred on justices of the peace. Burns' 1946 Replacement, § 4-2304.
>
> • • • • •
>
> "If the defendant could, instead, seek to be admitted to bail in the Circuit Court, after an adverse decision in the Criminal Court, there would be nothing to prevent him from going successively to the five Superior Courts and the other division of the Criminal Court of Marion County in search of the same relief. Such would be an intolerable procedure not contemplated by our statutes."

In the case before us the Criminal Court of Marion County, Division 2, has jurisdiction over the proceedings now pending in that court, including the right and duty to determine whether, under the law, the indictment charged a criminal offense against the defendant (appellant here).

We conclude that orderly judicial process requires that, as in this case, a person is restrained of his liberty pursuant to a criminal action, which action is phrased in the language of an existing statute and where an action is

challenged on the basis of the construction of the statute, then the issue of judicial construction and application of the statute to the existing facts must be presented directly in the court of original jurisdiction by an appropriate pleading in that court. The issue cannot be presented indirectly by proceedings in habeas corpus in another court.

Judgment is therefore affirmed.[2]

BOBBITT, *C. J.*, JACKSON and LANDIS, *JJ.* concur.

ARTERBURN, *J.* concurs in the result.

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2. Other issues presented by the appellant have not been discussed since they are not material to our decision.

APPENDIX B.

JURISDICTIONAL STATUTES.

28 U. S. C., Section 1257(3).

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

28 U. S. C., Section 2101(c).

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

UNITED STATES CONSTITUTION.

AMENDMENT 5.

"Criminal actions—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury,

except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT 14, Clause 1.

"Citizenship—Due process of law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE 1, Section 9, Clause 2.

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

INDIANA STATUTES ON HABEAS CORPUS.

Burns Sec. 3-1901 (Acts 1881 (Spec. Sess.), ch. 38, sec. 778, p. 240).

"Who may have writ.—Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of the restraint, and shall be delivered therefrom when illegal."

Burns Sec. 3-1904 (Acts 1881 (Spec. Sess.), ch. 38, sec. 779, p. 240).

"Complaint.—Application for the writ shall be made by complaint, signed and verified either by the plaintiff or by some person in his behalf, and shall specify:

"First. By whom the person in whose behalf the writ is applied for is restrained of his liberty, and the place where, naming all the parties if they are known, or describing them, if they are not known.

"Second. The cause or pretense of the restraint, according to the best of the knowledge and belief of the applicant.

"Third. If the restraint be alleged to be illegal, in what the illegality consists."

Burns Sec. 3-1905 (Acts 1881 (Spec. Sess.), ch. 38, sec. 780, p. 240).

"By whom granted.—Writs of habeas corpus may be granted by the circuit or superior courts of the county in which the person applying therefor may be restrained of his or her liberty, or by the judges of said courts, whether in term or vacation; or if said judges be absent from their circuits, or by reason of sickness or other cause be unable or incompetent to hear and determine the same, then by any such judge of any adjoining circuit, and upon application, the writ shall be granted without delay."

Burns Sec. 3-1907 (Acts 1881 (Spec. Sess.), ch. 38, sec. 782, p. 240).

"To whom directed—Its command.—The writ shall be directed to the officer or party having the person under restraint commanding him to have such person before the court or judge, at such time and place as the court or judge shall direct, to do and receive what shall be ordered concerning him, and have then and there the writ."

Burns Sec. 3-1914 (Acts 1881 (Spec. Sess.), ch. 38, sec. 787, p. 240).

"Return—How made.—The return must be signed and verified by the person making it, who shall state:

"First. The authority or cause of the restraint of the party in his custody.

"Second. If the authority be in writing, he shall return a copy and produce the original on the hearing.

"Third. If he has had the party in his custody or under his restraint, and has transferred him to another, he shall state to whom, the time, place and cause of his transfer. He shall produce the party on the hearing, unless prevented by sickness or infirmity; which must be shown in the return."

Burns Sec. 3-1915 (Acts 1881 (Spec. Sess.), ch. 38, sec. 788, p. 240).

"Proceedings—Pleadings.—The court or judge, if satisfied of the truth of the allegation of sickness or infirmity, may proceed to decide on the return, or the hearing may be adjourned until the party can be produced or for other good cause. The plaintiff may except to the sufficiency of, or controvert, the return, or any part thereof, or allege any new matter in avoidance; the new matter shall be verified, except in cases of commitment on a criminal charge. The return and pleadings may be amended without causing any delay."

Burns Sec. 3-1916 (Acts 1881 (Spec. Sess.), ch. 38, sec. 794, p. 240).

"Powers of court or judge.—The court or judge shall have power to require and compel the attendance of witnesses, and to do all other acts, necessary to determine the case."

Burns Sec. 3-1917 (Acts 1881 (Spec. Sess.), ch. 38, sec. 789, p. 240).

"Hearing—When party discharged.—The court or judge shall thereupon proceed, in a summary way, to hear and determine the cause; and if no legal cause be shown for the restraint or for the continuation thereof shall discharge the party."

INDIANA STATUTES ON TAX.

Burns Sec. 64-1001 (Acts 1919, ch. 59, § 134, p. 198; 1921, ch. 222, § 7, p. 638).

"Election—Assessing Officers—Oath—Bond—Vacancies. —For the purpose of listing and assessing all property for taxation, there shall be elected * * * in each township of the several counties in this state, an assessor for such township, who shall hold his office for the term of four (4) years * * * he shall give bond, with at least two (2) good and sufficient sureties, to the acceptance of the county auditor, in the sum of three thousand dollars ($3,000), payable to the state of Indiana, and conditioned for the faithful and impartial discharge of his duties according to law, and shall take and subscribe an oath or affirmation, to be indorsed on his bond, that he will faithfully, honestly and impartially discharge the duties of his office to the best of his skill and ability; * * * if * * * a vacancy should occur in said office in any township at any time, the county assessor, with the approval of the state board of tax commissioners, shall fill such vacancy by appointment, * * * In the event that the state board of tax commissioners finds that any township assessor or any deputy township assessor has not discharged any of his duties faithfully or in full accordance or compliance with law, such township assessor or deputy township assessor may be removed from office by the state board of tax commissioners for incompetency, neglect of duty or misconduct in office, after

five (5) days' notice and a hearing by said board and a vacancy thus created shall be filled as provided for in this section. Any township assessor or any deputy township assessor against whom the state board of tax commissioners has entered an order of removal from office shall have the right to an appeal from the decision of said board to the circuit court of the county in which the township of which he is assessor or deputy assessor is located, within ten (10) days from the time of the receipt of notice of the order of removal, by filing with said board of tax commissioners a written request praying an appeal to such circuit court and, upon the filing of such request, said state board of tax commissioners shall, within ten (10) days, file with the clerk of such court a certified copy of the original charges and the order of said board thereon, and said clerk shall immediately docket said cause and same shall be tried by the judge of said court de novo: * * * The oath of office to be taken by said assessor and indorsed upon his bond shall be in the words following:

STATE OF INDIANA,
COUNTY OF ..... } ss:

I, ..., do solemnly swear that I will support the Constitution of the United States, and the Constitution of the state of Indiana; that I will faithfully, impartially, and honestly discharge the duties of my office as township assessor, particularly that I will assess all property assessed by me at its true cash value, as such value is defined by law, according to my best knowledge and judgment, so help me God. * * *"

Burns Sec. 64-1024 (Acts 1919, ch. 59, § 154, p. 198).

"Correction of errors.— * * * the county auditor, if satisfied that such assessor has omitted any personal property, moneys, rights, credits, effect, stocks or real estate

in his township which it was his duty to return, may, if he deems it expedient, authorize and require such assessor to proceed to correct any error or omission * * * and, * * * such assessor shall, * * * after being so required and authorized, proceed to correct such errors and omissions * * * or the auditor may himself ascertain the value and add the same to the assessment, and * * * charge such person with the additional amount, if any, returned by such assessor."

Burns Sec. 64-1025 (Acts 1919, ch. 59. § 156, p. 198; 1943, ch. 159, § 1, p. 476).

"Omitted property—Corrections by township assessors. —Whenever the township assessor shall discover or receive credible information, or have reason to believe that any real or personal property has been omitted in the assessment of any year, or number of years, from the listing and assessing, or from the tax duplicate, or that any person, * * * has * * * omitted to list any part of his, her or their property, or has not returned the full value thereof, * * * he shall proceed to correct his list, and add such property to the assessment so that such property and the owner thereof may be charged with the proper amount of taxes thereon: Provided, however, before making such correction or addition, * * * he shall give the person claiming * * * such property, notice in writing of his intention to list such property, * * * and requiring such person to appear before him * * * to show cause, * * * why such property should not be listed and placed on the assessment book; * * * Such assessor shall also file with the county auditor a statement in writing of his reasons for making such a correction or assessment, and the facts or evidence upon which such reasons were based; the arrearages of tax which might have been assessed shall be charged against such person and property by the county auditor.

The county assessor shall also, at any time during the year, have the power to exercise the duties in this section prescribed for township assessors."

Burns Sec. 64-1026 (Acts 1919, ch. 59, § 32, p. 198).

"Omitted property—Inspection of books—Writs of assistance—Costs.—If, in listing and assessing property for taxation, any township assessor, or county assessor may have good reason to believe that any person, * * * within his jurisdiction has omitted to return for taxation any taxable property, that should have been returned by such person, * * * then such township assessor or county assessor, * * * may file his affidavit in the circuit court of the county wherein such tax return should have been made, * * * setting forth his belief that certain property, to be named in the affidavit, has been unlawfully omitted from a certain specified tax return of a designated person, * * * and that some other person, * * * has in his or its possession certain specified books or papers containing evidence tending to show such unlawful omission of taxable property. Upon the filing of such an affidavit, a writ shall forthwith issue and be served by the sheriff of said county, requiring the person, * * * having possession of such books or papers to permit the inspection, by the affiant, of such books or papers, * * * as may contain evidence tending to show the unlawful omission of taxable property complained of in said affidavit. And the court or the judge in vacation issuing such writ shall, for the purpose of enforcing obedience thereto, possess and exercise all the powers usually possessed and exercised by it or him in contempt proceedings. Like writ may be issued and enforced upon like affidavits made either by a county auditor, by the auditor of state, by any member of a county board of review, or by any member or authorized representative of the state board of tax commissioners. * * *

Every township assessor, county assessor, county auditor, auditor of state, board of review and board of tax commissioners shall have power to administer all necessary oaths or affirmation in the discharge of their duties. It shall be the duty of all assessors, and all other officers charged with the duty of listing property for taxation, or charged with the duty of collecting taxes, to give, in writing, all information they may acquire in reference to the concealment of property from taxation by any person, * * * to the county auditor, auditor of state, or to the county boards of review or state board of tax commissioners, * * *

"No inspection of the books or papers of any person, firm or corporation by any tax officer shall be permitted or required except as specified in this section. * * *"

Burns Sec. 64-1102. (Acts 1919, ch. 59, § 162, p. 198).

"Duties of county assessors.— * * * It shall be the duty of such county assessor to make a careful examination of the tax duplicate of the county, and also of all other records and papers in the offices of the county auditor, treasurer, recorder, clerk, sheriff and surveyor, and to list and assess, * * * upon the proper township assessor's books and to the proper persons, all omitted assessable property of every kind and nature whatsoever, * * * The county assessors shall have all the rights and power given by law to township assessors for the examination of persons and property, and the discovery and assessment of property, and making lists and returns of the same. * * * and all assessments so made by the county assessor shall have the same force and effect as if made in the first instance by the township assessor. It shall also be the duty of the county assessor, at any time during the year, to list and assess upon the proper assessor's books in the office of the county auditor any omitted property that he may discover and which should be assessed; * * * The county assessor is hereby

authorized and required to advise and instruct all township assessors of his county as to their duties under the law, * * * *It shall also be the duty of the county assessor to report to the state board of tax commissioners the incompetency or neglect of duty on the part of any township assessor or any deputy assessor, in order that said state board of tax commissioners may take action for the removal of such assessor or deputy assessor as provided in this act.* * * *''* (our emphasis.)

Burns Sec. 64-1201. (Acts 1919, ch. 59, § 164, p. 198; 1920 (Spec. Sess.) ch. 31, § 1, p. 101; 1943, ch. 103, § 1, p. 311.)

"Membership and officers—Meetings—Powers—Quorum. — * * * There shall be an annual board for the review of assessments and the equalization of the valuation of real and personal property in each county * * * composed of the county assessor, county auditor and county treasurer, and two (2) freeholders of opposite political parties * * * The county assessor shall be president and the county auditor secretary of said board, which shall be known as the 'County Board of Review' * * * where the county board deems it necessary to add omitted property, * * * such board may, at its option, cause to be served upon the person to whose list property is to be added, * * * a written notice * * * that it is proposed to correct or revise the returns, * * * of the person or persons named; * * * The board shall correct all errors in the names of persons in the description of property upon said list, and in the assessment and valuation of property thereon, and shall cause to be done whatever else may be necessary to make said * * * assessment comply with the provisions of this act. * * * the county auditor shall submit to the board of review the assessment list of the county as returned by the township assessors and added to and returned by the county assessor * * * The board of review shall consider

and act upon all recommendations made by the county assessor, and shall also, of its own motion or on sufficient cause being shown by any person, add to the assessment list the names of persons, the value of personal property and the description and value of real estate liable to assessment and omitted on said lists. * * *"

Burns Sec. 64-1321. (Acts 1919, ch. 59, § 189, p. 198; 1935, ch. 306, § 1, p. 1488.)

"Appeals from county board of review.—Any person, * * * dissatisfied with the action of the county board of review, upon any order for the assessment of hidden or omitted property, shall have the right to appeal * * * to the state board of tax commissioners; * * * The state board of tax commissioners, if it is dissatisfied with the action of the county board of review, * * * or with the assessment made by any township or county assessor as passed by the county board of review, shall have the right, * * * to require the county auditor to certify for review * * * any assessment * * * made. * * * Any county auditor who shall refuse or neglect to certify an appeal * * * shall be deemed guilty of malfeasance in office. * * *"

Burns Sec. 64-1402. (Acts 1919, ch. 59, § 204, p. 198.)

"Assessment of omitted property—Notice.—Whenever the county auditor shall discover or receive credible information, or if he shall have reason to believe that any real or personal property has, * * * been omitted, * * * from the assessment book or from the tax duplicate, he shall proceed to correct the tax duplicate, and add such property thereto, * * * to enable him to do which, he is invested with all the powers of assessors under this act. But, before making such correction, or addition, * * * he shall give such person notice in writing of his intention * * * and requiring such person to appear * * * and to show cause, * * *

why such property should not be added to the tax duplicate; * * * it shall be the duty of such county auditor to take the steps provided for by this section to place such omitted property on the tax duplicate. If such county auditor shall fail or refuse, on the discovery by himself, or on credible information being furnished him by another person, that property has been omitted from taxation, the state, on the relation of any state officer, or of the state board of tax commissioners, or of any taxpayer of the county in which such failure or refusal occurs, shall have the right to proceed against such county auditor in any court of competent jurisdiction by mandamus, to compel such county auditor to comply with the provisions of this section. In the trial of such a suit, the question of what constitutes credible information. * * * shall be a question of fact, to be determined by the court or jury trying the case, * * * If judgment shall be rendered to the effect that credible information has been discovered by, or furnished to such county auditor, or that he has reason to believe that property has been omitted from taxation, it shall then be the duty of such county auditor to forthwith place such omitted property on the tax duplicate in accordance with the provisions of this act, and such county auditor shall be liable for all costs of such mandamus suit and for a reasonable attorney's fee for relator's attorney, * * *"

Burns Sec. 64-2102. (Acts 1919, ch. 59, § 255, p. 198.)

"Assessment by county treasurer.—Whenever the county treasurer shall discover or receive credible information, or * * * have reason to believe, * * * that any property, real or personal, * * * has not been assessed by the assessor, * * * or that any person, * * * has, * * * omitted to list any part of his, * * * property * * * or shall discover, before the meeting of the county board of review, that any of the assessors have not returned the full value of the assessa-

bles * * * or have made any erroneous return * * * he shall report the same forthwith to the county auditor, whose duty it shall be to correct the tax duplicate in the hands of the county treasurer, adding such property * * * thereto, * * * All additional assessments of omitted * * * property, * * * made after the tax duplicate is in the hands of the county treasurer, shall be known as 'Auditor's Assessments,' and shall be entered, in the proper township, * * * the county auditor shall likewise enter the same upon the proper assessor's books in his office. * * *"

Burns Sec. 64-2103. (Acts 1919, ch. 59, § 256, p. 198; 1927, ch. 214, § 1, p. 611.)

"Appeals from decision of taxing authorities as to omitted property assessments.—From any finding, conclusion or decision of any county assessor, any county auditor, any county treasurer or any other officer or officers or board whose duty it may be to investigate, decide, assess and place on the tax duplicate of any county of this state any property subject to taxation and omitted to be returned, listed and assessed for taxation, the owner of such property or other person against whom such omitted property has been assessed shall have the right to appeal from such finding, conclusion or decision to the circuit court of the county wherein said omitted property is so listed or added for taxation: * * *"

Burns Sec. 64-2818. (Acts 1919, ch. 59, § 331, p. 198.)

"Failure to perform duty—Penalty.—Any officer who shall be guilty of violating any provisions of this act, or who shall wilfully neglect or refuse to perform any of the duties imposed on him by this act, *when no other provision is made herein*, shall be guilty of a misdemeanor, * * *" (our emphasis.)

APPENDIX C.

IN THE SUPREME COURT OF INDIANA.

Paul E. Tegarden, *Appellant,* *vs.* Criminal Court of Marion County, Division 2, Thomas J. Faulconer, in His Capacity as Judge of Criminal Court of Marion County, Division 2, Robert A. O'Neal, in His Capacity as the Sheriff of Marion County, The United Bonding Insurance Company, a Corporation, *Appellees.*	Cause No. 29940

PETITION FOR REHEARING.

The appellant petitions the court to grant a rehearing in the above entitled cause, and respectfully a represents that the court erred in its opinion and decision in each of the following respects:

1. In failing to give a statement in writing and in failing to give a decision thereon of a substantial question arising on the record, and presented by appellant's brief, in each of the following particulars, to-wit:

(a) As to whether the trial court erred in permitting the prosecuting attorney for Marion County

to participate in said proceedings when said prosecuting attorney was not a party thereto.

(b) As to whether the trial court erred in permitting the prosecuting attorney for Marion County to file in said proceedings a motion to strike irrelevant and immaterial allegations from the appellant's amended complaint for habeas corpus at a time when said prosecuting attorney was not a party in said proceedings.

(c) As to whether the trial court erred in overruling the appellant's exceptions to the return of the appellee Robert A. O'Neal as Sheriff of Marion County, Indiana, when said return was not in the form and did not contain allegations required by statute.

(d) As to whether the trial court erred in rendering its judgment solely upon the pleadings and without allowing the appellant a trial upon the facts alleged in his petition for writ of habeas corpus, and in his reply to the returns of the appellees.

(e) As to whether the trial court erred in denying the appellant's offer to, and in refusing to permit the appellant to adduce witnesses and introduce testimony and evidence in support of his complaint for habeas corpus, his exceptions, and replies to the returns of the appellees.

(f) As to whether the trial court erred and abused its discretion and denied appellant his state and federal constitutional rights of due process and equal protection of the laws in refusing to hear evidence and the testimony of witnesses on the issues presented in said cause by appellant's pleadings.

(g) As to whether the trial court erred in refusing to grant the appellant his discharge on habeas

corpus as prayed, when no return to the appellant's petition for writ of habeas corpus was filed in said cause by the appellee, The United Bonding Insurance Company, a Corporation.

(h) As to whether the trial court erred and abused its discretion by denying the appellant his constitutional rights to have remedy by due process of law as guaranteed by the Fifth Amendment and Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, and by due course of law as guaranteed by Sec. 12, Article 1, of the Constitution of Indiana, and by denying the appellant his constitutional rights to equal protection of the laws and equal privileges as guaranteed by Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, and Sec. 23 of Art. 1, of the Constitution of the State of Indiana, and by suspending the appellant's constitutional right to the writ of habeas corpus as guaranteed by Article 1, Sec. 9, Clause 2, of the Constitution of the United States, and Article 1, Sec. 27 of the Constitution of the State of Indiana.

2. In holding that a court in which an indictment or affidavit is pending has an exclusive right to restrain the accused of his liberty which cannot be challenged by habeas corpus in any other court, once it appears that the accused is being held on a warrant to answer such charge, and in citing the cases of *State ex rel. Smith* v. *Marion Circuit Court* (1951), 230 Ind. 21, 101 N. E. 2d, 272; *Bryarly* v. *Howard, Warden* (1947), 225 Ind. 183, 73 N. E. 2d 839; and *Wright* v. *The State* (1854), 5 Ind. 290, in support of such holding, for each of the following reasons, to-wit:

(a) The cases cited by the court in support of the proposition do not support the proposition.

(b) Such holding is contrary to the habeas corpus statutes of the State of Indiana as set forth in Chapter 38 of the Acts of 1881, Special Session, and particularly Sec. 780 of that Act.

(c) Such holding contravenes a ruling precedent of the Supreme Court as stated in the case of *State ex rel. Moore* v. *Carlin, Judge* (1948), 226 Ind. 437, reading as follows:

> "Relator being restrained of his liberty in Laporte County, Indiana • • • jurisdiction to entertain a petition for a writ of habeas corpus is in the Circuit or Superior Court of Laporte County, Indiana. Sec. 3-1905, Burns 1946 Replacement. While that statute reads that writs of habeas corpus *may* be granted by the Circuit or Superior Courts of the county in which the person applying therefor may be restrained of his or her liberty it has been held in effect that such actions *must* be brought in the courts named, and that such courts have exclusive jurisdiction in such proceedings. *Newsom* v. *Miles* (1942), 220 Ind. 427, 428, 44 N. E. 2d 297; *State ex rel. Berington* v. *Meyers, Judge* (1942), 220 Ind. 149, 150, 41 N. E. 2d 358; *Murphy* v. *Daly* (1934), 206 Ind. 179, 188 N. E. 769; *State ex rel. Howard* v. *Hamilton Circuit Court* (1946), 224 Ind. 220, 222, 66 N. E. 2d 62."

(d) Such holding contravenes a ruling precedent of the Supreme Court on the case of *Witte* v. *Dowd, Warden* (1951), 230 Ind. 485, 491, reading as follows:

> "• • • Clause 2 of Sec. 3-1918, Burns 1946 Replacement (Acts 1881 (Special Session), Ch. 38, Sec. 790, p. 240) which prohibits an inquiry into the legality of any judgment or process issued on a final judgment of a court of competent jurisdiction does not and cannot constitution-

ally prohibit an inquiry into the jurisdiction of the court rendering the sentence as determined by the intrinsic record of that court, and the process issued pursuant thereto."

3. In holding that:

"The returns of the appellees are, in substance, that the appellant, under the authority of Acts of 1919, Ch. 59, Sec. 331, p. 198 (being Sec. 64-2818 Burns 1951 Replacement) was indicted by the Grand Jury for having wilfully neglected and refused to perform the duties imposed upon him by law while township assessor of Washington Township, Marion County, Indiana;"

for each of the following reasons, to-wit:

(a) The appellee, the United Bonding Insurance Company, a corporation, filed no return whatsoever.

(b) The return of the appellee, Robert A. O'Neal, in his capacity as Sheriff of Marion County, contained no such allegations as that quoted from the court's opinion above, in substance or otherwise.

(c) The separate and several returns of the appellees Criminal Court of Marion County Division 2, and Thomas J. Faulconer, in his capacity as judge thereof, contained no statement specifically, or in substance, alleging that the appellant was indicted by the Grand Jury under the authority of Acts of 1919, Ch. 59, Sec. 331.

(d) The separate and several returns of the appellees Criminal Court of Marion County, Division 2, and its Judge, does not allege any authority under which the Grand Jury indicted the appellant. Said return merely alleges that the Grand Jury returned an indictment against the appellant, a copy of which was attached to said return, and then re-

cited what action was taken by said appellees pursuant to said indictment.

(e) Neither the return of the appellees court and Judge nor the return of the appellee Sheriff make any allegations affirmatively asserting the validity of either the indictment or the jurisdiction of the criminal court, or contravening the allegations of the appellant that all process was void.

(f) The indictment which was attached to the return of the appellees court and its Judge as Exhibit A, by alleging that the appellant "did then and there unlawfully and wilfully neglect and refuse to perform the duties imposed upon him by law as such township assessor", does not show that it was returned "under the authority of Acts 1919, Ch. 59, Sec. 331," for the reason that said Sec. 331 specifically limits its effect and application to "the duties imposed upon him by *this act*", meaning by Ch. 59 of the Acts of 1919, and does not apply to any other duties "imposed upon him *by law* as such township assessor." (Our emphasis.)

4. In holding that:

"The pleadings and papers above referred to were incorporated as exhibits in the return."

in the fourth grammatical paragraph of the court's opinion for each of the following reasons, to-wit:

(a) The "pleading and papers" to which the court's finding referred were (1) the indictment (2) the capias and its return, and (3) the recongnizance bond.

(b) The separate and several return of the appellees Criminal Court and its Judge, incorporated as an exhibit only the indictment returned by the Grand Jury, and did not include the capias issued pursuant to the indictment, the return of the Sheriff

thereon, or the recognizance bond given by the appellee, United Bonding Insurance Company.

(c) The capias and the Sheriff's return thereon were not incorporated as an exhibit to the return of the appellee, Robert A. O'Neal, in his capacity as Sheriff of Marion County until after their absence was directed to the attention of the Marion Circuit Court by appellant's exception to the Sheriff's return; and said return did not incorporate as an exhibit either the indictment of the grand jury, or the bond of the United Bonding Insurance Company.

(d) No return was filed by the Appellee, United Bonding Insurance Company, and the recognizance bond was not incorporated as an exhibit in the return of any of the appellees.

5. In holding that:

"Here the charge filed in the Criminal Court stated *in the language of the statute* that appellant (petitioner) wilfully neglected and refused to perform the duties of his office."

for each of the following reasons, to-wit:

(a) The language of the statute to which the court's opinion and holding referred reads in part as follows:

> "Any officer who shall be guilty of violating any provision of this act, or who shall wilfully neglect or refuse to perform any of the duties imposed on him by this act, when no other provision is made herein, shall be guilty of a misdemeanor, * * *." Sec. 64-2818.

(b) The language used in each of the 17 counts of the indictment by which the appellant was charged in Criminal Court reads in part as follows:

"* * * Paul E. Tegarden, * * * being then and

there the township assessor of Washington Township, Marion County, Indiana, did then and there unlawfully and wilfully neglect and refuse to perform the duties imposed upon him by law as such Township Assessor, * * *."

(c) The words "duties imposed upon him by law" are not the language of the statute which says:

"Duties imposed on him by this Act."

(d) It is within the judicial knowledge of the Supreme Court that statutory enactments affecting Township Assessors have been adopted in 12 different sessions of the Indiana State Legislature, and are incorporated in 17 different chapters of the laws of the State of Indiana, most of which impose duties on township assessors, and many of which imposed penalties for failure, neglect, or refusal to perform, such duties. The 17 separate enactments are found in Acts 1899, Ch. 154; Acts 1905, Ch. 129; Acts 1919, Ch. 59; Acts 1921, Ch. 210; Acts 1923, Ch. 74; Acts 1925, Ch. 91; Acts 1933, Ch. 50; Acts 1935, Ch. 215; Acts 1937, Ch. 133; Acts 1937, Ch. 138; Acts 1945, Ch. 208, Acts 1945, Ch. 212; Acts 1949, Ch. 34; Acts 1949, Ch. 245; Acts 1953, Ch. 169; Acts 1953, Ch. 187, and Acts 1953, Ch. 219.

6. In holding that: "The action was originally filed against the above named appellees and also against Phillip L. Bayt as prosecuting attorney of Marion County, and Patrick J. Barton, as grand jury deputy prosecuting attorney, all of whom filed returns to the action" for each of the following reasons, to-wit:

(a) No return was filed by the appellee, The United Bonding Insurance Company, a corporation.

(b) No return was filed by Phillip L. Bayt as prosecuting attorney of Marion County.

(c) No return was filed by Patrick J. Barton, as grand jury deputy prosecuting attorney.

(d) The appellees, Criminal Court and its judge filed a separate and several return to the Writ of Habeas Corpus (Appellant Brief p. 13).

(e) The appellee Sheriff of Marion County filed a "Return to plaintiff's amended complaint".

(f) The Marion Circuit Court, on appellant's petition, issued a writ of Habeas Corpus.

(g) Under the governing statutes, a return was required to be filed to the Writ of Habeas Corpus issued by the Circuit Court, not "to the action".

(h) No provision for filing a return "to the action" is included in the statute, and the use of the word "action" in the context of the court's holding is inaccurate and tends to confuse the nature of the proceedings, obfuscates the statutory requirements for the contents of a proper return, and creates the basis for a possible future misconstruction by the bench and bar in interpreting the meaning of the statute governing habeas corpus proceedings.

7. In holding that: "The action was later dismissed by the appellant as to Bayt and Barton, who subsequently thereto filed motions to dismiss the action and thereby attempted to re-enter into the case", for each of the following reasons, to-wit:

(a) "Motions" were not filed by both Bayt and Barton.

(b) A motion "to dismiss the writ of Habeas Corpus heretofore issued in this cause" was filed by Bayt, as prosecuting attorney, but Barton was not included as a moving party, nor mentioned therein.

(c) It is an inaccurate statement to hold that there was filed a motion "to dismiss the action", when in

fact the motion was "to dismiss the writ of Habeas Corpus".

(d) The inaccurate statement of fact, has led the court to an inaccurate legal conclusion that the appellant was not prejudiced by the action of the Circuit Court in permitting the prosecuting attorney to participate in the proceedings, and in failing to strike his motion from the file.

(e) Bayt and Barton did not attempt "to reenter" the case by the motion to dismiss. Barton made *no* effort to reenter the case at any time. Whether Bayt ever attempted to re-enter the case is obscure as shown by the record, and appellant's brief (pp. 107-8) where the confusion noted was that (1) deputy prosecutors Thomason and Tranberg appeared on behalf of the State of Indiana (Tr. p. 120, ll. 16-17); (2) also as amicus curiae (Tr. p. 122, ll. 15, 16); (3) Prosecuting Attorney was no longer a party (Tr. p. 123, ll. 1-13); (4) Sheriff left defense of habeas corpus action to State of Indiana (Tr. p. 123, l. 15, p. 124, l. 4); (5) Deputy prosecuting attorney Tranberg allowed to intervene (Tr. p. 125, ll. 5-21); (6) Bayt filed a petition for authority to intervene as party defendant according to order book entry (Tr. p. 66, ll. 5-8); (7) but according to the petition filed by Bayt, the State of Indiana requested authority to intervene (Tr. p. 67, ll. 20-21); and (8) no order book entry granted or noted intervention as party defendant of either the State, or Bayt, or Tranberg. But if he did, there is no indication in the record anywhere that Bayt attempted to re-enter the case by way of the motion to dismiss the writ of habeas corpus, which motion itself, in paragraph 9, alleges that appellant's petition for the writ was dismissed as to said prosecuting attorney. (See appellant's brief, p. 69 (d)).

8. In holding that: "The appellant then filed a motion to strike the motions of the prosecutor Bayt and deputy prosecutor Barton", and in holding that: "The briefs contain considerable argument as to the status of Bayt and Barton in the proceedings, and the effect on the judgment resulting from the fact that the court failed to rule upon appellant's motion to strike their motions to dismiss", for each of the following reasons, to-wit:

(a) Barton made no motion to dismiss, and appellant filed no motion to strike a motion by Barton.

(b) Barton's status was not argued extensively in the briefs, the arguments being directed almost exclusively to Bayt.

(c) The "effect on the judgment" to which appellant referred in his briefs, related to the presence and participation of Bayt, as prosecuting attorney of Marion County (and not to Barton) in said proceedings, as an unauthorized person, whose mere presence would be considered harmful. (See appellant's Brief, pp. 112-114, and appellant's Reply Brief, pp. 11 and 12).

(d) The language of the holding implies that the only cause of the effect referred to was the failure of the trial court to rule on appellant's motion to strike, whereas said failure was but one of a series of errors which were cumulative in producing the erroneous judgment.

(e) The holding disregards, and apparently gives no consideration to the fundamental cause and effect of the undue influence of unauthorized presence, which is the gist of the "considerable argument" in appellant's brief.

9. In holding that "Since the action was not dismissed but was decided upon the 'returns' of the appellees, we cannot say that failure of the court to rule on the appellant's

motion to strike in any way prejudiced the rights of the appellant and therefore constitutes reversible error" for each of the following reasons, to-wit:

(a) There was no motion to dismiss "The action", filed in the Circuit Court, which that court could have sustained, but did not, whereby reversible error was avoided, as is implied in said holding.

(b) The holding contains an implication that a "motion to dismiss the action", is a proper procedure for defendants in a habeas corpus proceeding.

(c) It is inaccurate, and contrary to the statute, to interpret a motion to dismiss the writ of habeas corpus to be the same as a motion to dismiss the action; but if such an interpretation is intended by, or can be implied from the court's holding, then the statement is in direct conflict with the statute governing dismissals, and the ruling precedents of the Supreme Court involving said statute, since there are no facts present in this case under which a defendant would be authorized by Burns 2-901 *et seq.*, to ask the court to dismiss the plaintiff's action.

(d) "Since the action was not dismissed" constitutes a false and inaccurate premise, and does not support the stated conclusion that appellant's rights were not prejudiced.

(e) The case was not decided "upon the 'returns' of the appellees" because (1) returns were not filed by all appellees; (2) no returns were filed by the bonding company, being the defendant which, under the law, had the actual custody of appellant; (3) the return of the Sheriff was fatally defective for failure to contain certain allegations; (4) the circuit court announced its decision would be made on the pleadings (Tr. p. 137, ll. 4-11; p. 138, l. 3); (5) the pleadings included the

petition, the returns, the exceptions thereto, the plaintiff's reply to the returns, the prosecutor's motion to dismiss, the plaintiff's motion to strike, the petition to intervene, the prosecutor's motion to strike certain allegations.

(f) The secondary premise that the case "was decided upon the returns", is also false and inaccurate, and does not support the stated conclusion that appellant's rights were not prejudiced.

(g) The holding disregards or overlooks the record in this case as to the basis upon which the decision of the Circuit Court was made, and particularly the relationship of that part of the judgment which said "that the jurisdiction is in Criminal Court, Division 2"; toward, and its correlation with, the allegations contained in the Prosecutor's motion to Dismiss Writ of Habeas Corpus. (See appellant's brief, pp. (a) -69(d).)

(h) Since the prosecutor's motion to dismiss was a part of the pleadings at the time the decision was rendered by the Circuit Court, and the judgment contained a similar reference to the jurisdiction of the Criminal Court as was variously alleged in the prosecutor's motion to dismiss, it is legally impossible for the Supreme Court to hold (as a matter of record) that they "cannot say that failure of the court to rule on the appellant's motion to strike in any way prejudiced the rights of the appellant."

10. In holding that appellant's assertion of lack of Criminal Court jurisdiction was based *only* "on the ground that under the statute 'there is no such criminal offense' ", for each of the following reasons, to-wit:

(a) The opinion quotes the words "there is no such criminal offense" out of context. Those words as quoted from page 117 of appellant's brief, refer to the

preceding sentence, which reads: "for this conduct the State attempts to prosecute the plaintiff upon a criminal charge denominated 'Refusal to Perform Duties' ". In context, the assertion of appellant is there is no such criminal offense as "Refusal to Perform Duties".

(b) The above holding of the court appears at the end of a paragraph in which reference is made to Acts 1919, Ch. 59, Sec. 331 (Burns 4-2818) as the authority asserted in "The returns of the appellees" upon which the grand jury indicted appellant "for having wilfully neglected and refused to perform the duties imposed upon him by law while township assessor of Washington township * * *".

(c) Appellant's assertion of lack of jurisdiction in the Criminal Court is based on the ground that the entire process by which appellant was being restrained of his liberty was void.

(d) The holding imposes a much more limited interpretation upon the appellant's assertion than made by appellant, and disregards or fails to make clear the three facets of jurisdiction, viz.: (1) over the subject matter, (2) over the person, (3) over the particular case.

11. In holding that: "The court * * * made a finding, based solely upon the petition of the appellant and the returns filed thereto," for each of the following reasons, to-wit:

(a) The Circuit Court said it made its decision on the pleadings. (Tr. p. 137, ll. 4-11; p. 138, l. 3.)

(b) In addition to the petition of appellant and the returns filed thereto, the pleadings included the appellant's exceptions and reply to the returns, the prosecutor's Motion to dismiss, the appellant's motion to

intervene, and the prosecutor's motion to strike certain allegations.

(c) On the basis of the record, including the judgment itself, and the fact that among all the pleadings only the prosecutor's motion to dismiss the writ of habeas corpus affirmatively asserted that the Criminal Court had jurisdiction of both criminal prosecutions and habeas corpus proceedings, it cannot accurately be said that the court's finding was made only on the petition and the returns.

(d) The holding overlooks and disregards the effect upon the court's finding and judgment of the prosecutor's pleading which should have been struck from the files.

12. In holding that: "Thus the decision of the case involves not merely a question of fact, but preliminary thereto, there is a question of statutory construction which must be decided", for each of the following reasons, to-wit:

(a) The meaning and application of this statement in the opinion is obscure and uncertain.

(b) "The decision of the case" could refer to either the case in Criminal Court, or the habeas corpus case in Circuit Court, and the context of the opinion is not sufficiently clear to be sure which "case" the court intended.

(c) If the case in Criminal Court was intended, its decision would involve proof of facts by the State of the alleged offense, and, before reaching the trial state, the question of statutory construction could be raised by the defendant, but there is no legal procedure or requirement which makes such action mandatory; the question of jurisdiction is one which, under Indiana law, could be raised for the first time even as late as upon appeal.

(d) If the habeas corpus case in Circuit Court was intended, then there is a question of statutory construction "which *must* be decided", but the questions of fact involved are incidental to and a part of the statutory construction, and the record in this case presents no questions of fact for determination (or even consideration) *after* the question of statutory construction has been decided.

(e) Whether applied to the one case or the other, the holding contains an element of error, which should be clarified in order to enable the opinion to be understood.

13. In holding that the prosecution in Criminal Court is not a complete nullity and that the pertinent statute, instead of excluding appellant "in clear and unequivocal terms * * * presents a serious question of statutory construction which it was the right and responsibility of the trial court to determine", for each of the following reasons:

(a) If by the words "trial court" the holding intends to designate the Criminal Court, then the effect of the holding is to make the court in which a prosecution is pending the exclusive judge of its own jurisdiction.

(b) The law in Indiana does not require an accused to submit solely to the jurisdiction of the court in which he stands accused for the purpose of having the trial court determine whether it has jurisdiction of the case.

(c) The holding is contrary to the ruling precedent of *Gingerich* v. *State* (1948), 226 Ind. 678, 689, disregards or fails to apply correctly the provisions of Burns Statutes (Sec. 9-2401); and deprives the appellant of his constitutional right to test the jurisdiction of the Criminal Court by a proceeding in habeas corpus.

(d) Because the Criminal Court may have the right and power to construe a statute, that fact in itself is not sufficient reason for the opinion of the Supreme Court to hold at least by implication, that the Criminal Court must be given the exclusive responsibility and capacity for making the statutory construction.

(e) If by the words "trial court" the holding intends to designate the Marion Circuit Court, that being the court in which the instant habeas corpus case was tried, then the conclusion stated agrees with contentions of the appellant, but is inconsistent with the final judgment of the Supreme Court affirming the trial court.

(f) The requirement, implicit in the holding, that a defendant must be *excluded* from the scope of a criminal statute "in clear and unequivocal terms" establishes a new standard in Indiana for the construction of criminal statutes, which reverses all prior decisions on the subject, including *Gingerich* v. *State* (*supra*) which holds, *inter alia*, "* * * it is a fundamental rule in the construction of statutes, that penal statutes must be construed strictly * * *", and *Van Arsdall* v. *Indiana Bell Telephone Co.* (1926), 84 Ind. App. 257, 259, to the effect that "it is a well established rule of statutory construction that a penal statute will be strictly construed, and that it will not be construed to include anything beyond its letter, though within its spirit, and that nothing will be added by inference, or intendment."

(g) Under existing Indiana law, the correct holding should be: "The pertinent statute does not *include* appellant in its application in clear and unequivocal terms."

(h) If the holding correctly adhered to existing

Indiana law, the only legal conclusion which could flow therefrom would establish the clear and complete nullity of the proceedings in Criminal Court, and require the reversal of the Circuit Court's judgment.

14. In discussing informally the construction of the statute only upon cursory examination thereof, and in making observations upon some parts of the statute while totally ignoring other equally pertinent parts, which, had the court considered fully and accurately, would have produced the opposite result from the one announced, and would have required a reversal of the judgment of the Circuit Court, for each of the following reasons, to-wit:

(a) Section 134, Acts 1919, Ch. 59, provides for removal from office of a township assessor who "has not discharged any of his duties faithfully or in full accordance or compliance with law", such conduct being the definition ascribed to the words "incompetency, neglect of duty, or misconduct in office" by that section of the act.

(b) The opinion and holding of the court in discussing removal of a township assessor by the State Board of tax Commissioners for "incompetency, neglect of duty or misconduct in office" totally disregards and gives no consideration to the import and effect of this definition on Section 331 (Burns Sec. 64-2818).

(c) The comment of the court that "*mere* incompetence or neglect of duty" were the grounds for removal, shows the lack of consideration by the court of the definitive portion of said section.

(d) The conduct described in section 134 as failure to "discharge any of his duties faithfully or in full accordance or compliance with law" is much broader and more encompassing than the language of section

331, and includes both "wilful" and non-wilful neglect, *refusal* to perform, and passive non-performance of duties, intentional and unintentional lack of compliance with law.

(e) The distinction made in the court's opinion between "mere incompetence or neglect of duty" and "perverse and wilful misconduct", imports the false implication that the penal section 331 requires some- [illegible] of a criminal prosecution", when in fact section 134 not only covers everything in Sec. 331, but also a great deal more besides.

(f) The court's comment concerning whether the term "when no other provision is made herein" is intended to apply only to the criminal provisions of the act which immediately precede section 331, creates a question where none exists. The reason for this misconception by the court lies in the court's failure to note that the precise language of Sec. 331 "provisions of *this act*" and "duties imposed on him by *this act*" precedes the words "when no other provision is made herein". The only plain, clear, and unequivocal interpretation which can be made, is that the word "herein" refers to "this act", and not to "the two preceding sections of this act."

(g) Section 162 of "this act" includes the following pertinent provisions:

> "It shall be the duty of (the) county assessor to make careful examination of the tax duplicates of the county and also other records • • • and to list and assess • • • upon the proper township assessor's books • • • all omitted assessable property of every kind, and nature whatsoever • • •"

"It shall also be the duty of the county assessor at any time during the year, to list and assess upon the proper assessor's books in the office of the county auditor any omitted property that he may discover and which should be assessed; * * *

"The county assessor is required to advise and instruct all township assessors of his county as to their duties under the law * * *"

"It shall also be the duty of the county assessor to report to the State Board of Tax Commissioners the incompetency or neglect of duty on the part of any township assessor * * * in order that said board of tax commissioners may take action for the removal of such assessor * * * as provided in this act."

(h) The term "when no other provision is made herein" precedes the penal words in section 331. The position of said clause in the section clearly shows the legislative intent to omit, and not to include in the statutory definition of the misdemeanor, the wilful neglect and refusal to perform duties imposed by Acts 1919, Ch. 59, on township assessors, because of other provisions in that act.

(i) Because the offense charged in the indictment is colorless, and an impossible one under the law, *no* jurisdiction exists in the Criminal Court, not even for the purpose of construing the statute, and the Appellant is entitled to be discharged on the Writ of Habeas Corpus by another Court having jurisdiction to entertain the writ.

(j) The informal discussion of the construction of the statute gives rise to judicial sanction of partial, and therefore inadequate as well as inaccurate statements, which could mislead both judges and lawyers in

their future consideration of the same or other sections of the said act, and does not render to the Appellant the just and complete consideration of the questions presented by his appeal.

13. In holding that the Criminal Court of Marion County, Division 2, should make the judicial construction of, and apply the statute to the existing facts, as the Court of original jurisdiction, that the issue cannot be presented indirectly by proceedings in habeas corpus in another court, and in citing *State ex rel. Smith* v. *Marion Circuit Court*, 230 Ind. 21, in support of such holding, for each of the following reasons, to-wit:

(a) *State ex rel. Smith* v. *Marion Circuit Court* is not authority for the Court's said holding. In discussing that case the court omits mentioning and apparently disregards, the controlling fact of that case, namely, that the defendant had filed a petition to be let to bail in in the Criminal Court of Marion County, which had been denied by that Court, *before* he filed his petition in habeas corpus to be let to bail in the Marion Circuit Court. The issue presented to the Supreme Court involved *conflicting* jurisdiction, and did not involve the question of *no* jurisdiction in the Criminal Court, such as is involved in the instant case.

(b) *State ex rel. Smith* v. *Marion Circuit Court*, did not involve the issue of statutory construction of the criminal charge involved or of the jurisdiction of the Criminal Court over that charge. There was no dispute, no assertion, and no denial that the Criminal Court had jurisdiction over the charge of second-degree murder. After the Criminal Court had held the facts did not warrant Jordan's release on bail, the Circuit Court held that the same facts did warrant his release on bail, and conflicting orders were given to the

Sheriff of Marion County, by the two courts. The decision in the *Smith* case held that the Circuit Court had no power to review or rescind the prior order and judgment of the Criminal Court.

(c) The facts and the ruling in the *Smith* case are not pertinent to the facts and the issues in the instant case.

(d) The Court's holding herein makes the assumption that the Criminal Court had "original jurisdiction", as the premise upon which it reaches its final conclusion that it alone has exclusive jurisdiction to construe the Statute which puts in issue that very jurisdiction. In logic, it is a basic concept, that a syllogism which starts with a wrong premise will produce a wrong conclusion. It is equally true that if the conclusion sought to be established is adopted as the premise of the syllogism, little or no logic is required to arrive at the conclusion desired. The court's holding falls into these fatal errors.

(e) The record in this case is based upon the initial petition of the appellant which alleged that all proceedings in the Criminal Court were void. The record shows that this issue was not disputed or denied in any return filed by any of the appellees. The record shows that the issue of "void proceedings" was never tried. The record shows that the Circuit Court disregarded that issue in making its decision. And the holding of this Court now records that said issue under the statute has been given only "cursory examination".

(f) The holding contravenes the ruling precedent of the Supreme Court of Indiana in the case of *Witte* v. *Dowd* (1951), 230 Ind. 485, which holds that "clause 2 of Section 3-1918 Burns • • • which prohibits an

inquiry into the legality of any judgment or process issued on any final judgment of a court of competent jurisdiction, *does not and cannot constitutionally prohibit an inquiry into the jurisdiction of the court rendering the sentence as determined by the intrinsic record of that court, and the process issued pursuant thereto.*"

(g) The holding contravenes the ruling precedent of the Supreme Court of Indiana in the case of *Kabanya* v. *Fogarty* (1923), 193 Ind. 297, which holds: "A writ of habeas corpus raises the question of the jurisdiction of the Court over the persons, and over the subject matter and also his jurisdiction to enter the particular judgment which he does enter."

(h) The holding contravenes the ruling precedents of the Supreme Court of the United States, to the effect that an indictment may be inquired into on habeas corpus proceedings for the purpose of determining whether it states an offense known to the law as held in the following cases:

Hyde v. *Shine*, 199 U. S. 62, 25 S. Ct. 760.
Greene v. *Henkel*, 183 U. S. 249, 22 S. Ct. 218.
Andrews v. *Swartz*, 156 U. S. 272, 15 S. Ct. 389.
U. S. v. *Pridgeon*, 153 U. S. 48, 14 S. Ct. 746.

(Also see other cases supporting this prevailing view as cited on pp. 177 and 178 in Appellant's Brief.)

(i) The holding contravenes the ruling precedents of the Supreme Court of the United States to the effect that "* * * if the offense charged in the indictment is colorless, or impossible, or an impossible one under the law, there is no jurisdiction in the Court, and if a prisoner is held in custody on such an indictment, void on its face, he may be discharged from such custody upon writ of habeas corpus by *another*

court having jurisdiction to entertain the writ" (our emphasis) as held in the following cases:

Andrews v. *Swartz*, 156 U. S. 272, 15 S. Ct. 389.
Ex Parte Yarbrough, 110 U. S. 651, 45 S. Ct. 152.
U. S. v. *Pridgeon*, 153 U. S. 48, 14 S. Ct. 746.

(j) The holding contravenes the ruling precedents of the Supreme Court of the United States to the effect that "where a person is detained for the doing of certain acts, which neither at common law, nor under the law of a particular state constitutes an offense, the court has no jurisdiction, since jurisdiction in this class of cases depends on a violation of some law, and therefore habeas corpus will issue where this state of facts is alleged by the applicant or where it is admitted in the return," as held in the following cases:

Ex Parte Siebold, 100 U. S. 371.
Ex Parte Yarbrough, *supra.*
Re Coy, 127 U. S. 731.
Green v. *Henkel*, *supra.*
Hyde v. *Shine*, *supra.*

(k) The holding contravenes the ruling precedents of the Supreme Court of Indiana to the effect that the legislative purpose in declaring that no citizen shall be put on trial except on indictment or affidavit charging a public offense, is to guard the liberties of the people, and to shield and protect the individual from the disgrace, expense and hazard involved in a criminal prosecution, as held in the following cases:

Trisler v. *State* (1954), 235 Ind. 479, 482.
Embry v. *State* (1950), 229 Ind. 179, 181.
Gilly v. *State* (1949), 227 Ind. 701, 708.
State ex rel. Reeves (1949), 227 Ind. 595, 598.
Gingerich v. *State* (1948), 226 Ind. 678, 688.
State ex rel. Davis (1948), 226 Ind. 576.

(l) The holding denies to the Appellant his constitutional guaranties of due course of law and due process of law under Art. 1, Sec. 12 of the Constitution of Indiana, and under the 5th Amendment and section 1 of the 14th amendment of the Constitution of the United States; and suspends his constitutional guarantee of the privilege of habeas corpus under Art 1, Sec. 27, of the Constitution of Indiana and Art. 1, Sec. 9, clause 2 of the Constitution of the United States.

16. In holding in footnote 2 of the opinion that "other issues presented by the appellant have not been discussed since they are not material to our decision." for each of the following reasons, to-wit:

(a) Such holding disregards, and deprives the Appellant of his rights under Art. 7, Sec. 5 of the Constitution of the State of Indiana.

(b) Such holding disregards the very essence of Appellant's petition for habeas corpus, of the proceedings therein, and of the appellant's assignment of errors pointing out the defects in said proceedings.

(c) Under such holding the court has failed to give a statement in writing and a decision to which Appellant was entitled on the question presented by the record as to whether the returns of the Appellees Criminal Court, and its Judge and the Sheriff of Marion County, in failing to deny the void character of the proceedings as alleged in the Appellant's complaint, should be construed as admitting the truth of such allegations, whereby the Appellant was entitled to his liberty as a matter of law.

(d) Under such holding the Court has failed to give a statement in writing and a decision to which Appellant was entitled on the question presented by

the record as to whether the returns of the Appellees Criminal Court, and its Judge, and the Sheriff of Marion County, were legally adequate and sufficient response to the Appellant's allegations that all process in the Criminal Court and matters incidental thereto were void, and as to whether the Marion Circuit Court [illegible] Appellant's exceptions to said returns.

(e) Under such holding the Court has failed to give a statement in writing and a decision to which Appellant was entitled on each of the questions presented by the record as enumerated and set forth under error number 1, *supra*.

WHEREFORE, the appellant prays the court to grant a rehearing of the above entitled cause, and for all proper relief incidental thereto.

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APPENDIX D.

IN THE SUPREME COURT OF INDIANA.

Paul E. Tegarden, *Appellant*, *vs.* Criminal Court of Marion County, Division 2, Thomas J. Faulconer, in his capacity as Judge of Criminal Court of Marion County, Division 2; Robert A. O'Neal, in his capacity as the Sheriff of Marion County; The United Bonding Insurance Company, a Corporation, *Appellees.*	Cause No. 29940.

APPELLANT'S MOTION TO RECONSIDER COURT'S RULING DENYING PETITION FOR REHEARING.

Comes now Paul E. Tegarden, Appellant in the above entitled cause and respectfully moves the court to reconsider its ruling heretofore made on May 24, 1961, in which the court denied the Appellant's Petition for a Rehearing without opinion.

In support of said Motion the Appellant respectfully shows the court that after due consideration and inquiry it was deemed appropriate to request the court to state in writing answers to each of the following questions:

1. Did the Court intend to overrule *Witte* v. *Dowd*, 230 Ind. 485?

2. When an action has been put at issue by the pleadings of the parties, which pleadings did not include a motion for judgment on the pleadings, can the trial court arbitrarily deny to the plaintiff the opportunity to present evidence?

3. Is an indictment a part of the intrinsic record of the Criminal Court of Marion County?

4. Does a charge in the indictment that the defendant did unlawfully and wilfully "neglect and refuse to perform the duties imposed on him by law as such township assessor", constitute a statement in the language of the statute that the defendant did "wilfully neglect or refuse to perform any of the duties imposed on him by this Act"?

5. If it does not, on the issues established by the pleadings in the trial court, would the plaintiff be entitled to introduce the testimony of witnesses and other evidences to establish the fact that the State intended to charge in the Indictment a violation of Burns § 64-2818 and did not intend to charge a violation of any other statute or section thereof?

6. When the petitioner made direct and positive assertion that the Criminal Court processes were void, is he entitled under the due process clauses of the State and Federal Constitutions to be permitted to prove the allegations of his petition for a Writ of Habeas Corpus?

7. When the Marion Circuit Court denied the appellant the opportunity to prove his allegations and denied his release on Habeas Corpus without considering and construing the statute, was he thereby denied "due process"?

8. Does or can Clause 4 of Burns § 3-1918 constitutionally prohibit an inquiry into the jurisdiction of the court issuing the warrant as determined by the intrinsic record of that court?

It is also deemed appropriate for the court to give a statement in writing of each question arising in the record of this case and the decision of the court thereon.

Respectfully submitted,

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